TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. [redacted] 248

[redacted]

vs.

[redacted]

APPEAL [redacted]

(27,469)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 714.

MARY GILPIN, A MINOR, BY HER NEXT FRIEND, SAMUEL GILPIN, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1919, of said Court, Before the Honorable John E. Carland and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable James D. Elliott, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the thirtieth day of September, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Mary Gilpin, a minor, by her next friend Samuel Gilpin, was Appellant, and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 United States District Court, District of Nebraska, Omaha Division.

Pleas Before the District Court of the United States Within and for the District of Nebraska, at a Term Begun and Holden in the City of Omaha, in said District, on the First Monday in April, A. D. 1918, Before Hon. J. W. Woodrough, One of the Judges of said Court.

Be it remembered, that on the 5th day of February, A. D. 1913, there was filed in the office of the Clerk of said Court, a Bill of Complaint, in the words and figures following, to-wit:

Bill of Complaint.

In the District Court of the United States for the District of Nebraska, Omaha Division.

No. 3. Equity.

MARY GILPIN, a Minor, by Her Next Friend, SAMUEL GILPIN, Complainant,

vs.

UNITED STATES OF AMERICA, Defendant.

To the Honorable the Judges of the District Court of the United States for the District of Nebraska:

Mary Gilpin, a minor, by her next friend Samuel Gilpin, brings this her bill of complaint against the United States of America, defendant, and complaining avers that said Mary Gilpin is a member of what, until recently, was known as the Omaha Tribe of Indians of Nebraska, being the tribe of Indians designated as the Omahas in the various statutes of the United States, and in the treaties hereinafter referred to, and that the cause of action in this bill of complaint set forth is one arising under treaties heretofore made between the Omaha Tribe of Indians and the United States, and under the laws of the United States relating to the Omaha Indian Reservation and the allotments of lands thereunder to the members of the Omaha Tribe of Indians, including this complainant, and that the value of the sum in controversy herein exceeds the sum and value of $3,000, exclusive of interest and costs. Complainant further avers that said Mary Gilpin has been recognized by the said tribe and the
2 members thereof as a member of the said tribe, and entitled to all the rights and privileges of a member of the said Omaha Tribe of Indians.

II.

Complainant further complaining avers that, on the 16th day of March, 1854, a certain treaty was entered into by and between the Omaha tribe of Indians and the United States of America, wherein and whereby the Omaha tribe of Indians ceded to the United States certain lands in lieu whereof they received their present reservation, including the lands hereinafter more particularly described, which treaty more fully appears in the United States Statutes at Large, Volume 10, page 1043, to which for greater certainty your complainant refers.

III.

Your complainant further avers that on the 6th day of March, 1865, another treaty was entered into between the Omaha tribe of In-

dians and the United States of America, which contained a provision in Article IV to the import and effect that the lands not ceded to the United States but reserved for the Omaha tribe of Indians should constitute and be known as the "Omaha Reservation," and that the said lands composing the said "Omaha Reservation" should be subject to assignment in limited quantities in severalty to the members of the Omaha tribe of Indians, meaning and intending thereby that the title (ownership) to the said lands should vest in the Omaha tribe of Indians subject to allotment to the individual members of the tribe as therein provided for, and therein and thereby vested in the Omaha tribe of Indians and their individual members thereof, a title to the said lands as distinct from a mere right of occupancy, and that the vesting of said title in said lands in the Omaha tribe of Indians and the individual members thereof was based upon a valuable consideration between the said Omaha tribe of Indians and the United States of America, to-wit: by the session of said tribe to the United States of certain lands as in said treaty provided, and by reason whereof the United States and the Congress of the United States were divested of authority to pass any act which would legally deprive the Omaha tribe of Indians and the individual members thereof, including complainant herein, of the legal right in and to said land, or the legal right of your complainant hereinto claim, assert, and have an allotment in the lands denominated in said treaty as the "Omaha Reservation." The said treaty of 1865
3 more fully appears in the United States Statutes at Large, Volume 14, page 667, and to which for greater certainty your complainant refers.

IV.

Your complainant further avers that the Congress of the United States passed an act, approved August 7, 1882, which provides upon the consent of the Omaha Tribe of Indians for a sale of a portion of the Omaha Indian Reservation lying west of the right of way granted by the Omaha Tribe of Indians to the Sioux City & Nebraska Railroad Company, under an agreement dated April 19, 1880, and approved by the Secretary of the Interior, July 27, 1880. That by Section 5 of said act it was further provided that the "Secretary of the Interior be authorized to allot the lands of the Omaha Reservation, and lying east of the said right of way in severalty to the Indians of said tribe in quantity, as follows: To each head of a family one-quarter of a section; to each single person over eighteen years of age one-eighth of a section; to each orphan child under eighteen years of age one-eighth of a section; and to each other person under eighteen years of age one-sixteenth of a section; which said allotments to be in lieu of allotments or assignments provided for in the fourth article of the treaty of 1865."

V.

Section 6 of said act of 1882 further provided that the Secretary of the Interior "shall cause patents to issue therefor in the name of

the allottees, which patents shall be of legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, etc."

VI.

That by Section 7 of said act it was further provided, "that upon the completion of said allotments and the patenting of the lands of said allottees each and every member of said tribe of Indians shall have the benefit of, and be subject to the laws of the State of Nebraska, and said state shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

VII.

That by Section 8 of said act of 1882 it is further provided: "That the residue of lands lying east of the said right of way of the
4 Sioux City and Nebraska Railroad, after all allotments have been made, as in the fifth section of this act provided, shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: And, provided further, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."

That said act of 1882 is set forth in the United States Statutes at Large, Volume 22, page 341, to which for greater certainty your complainant refers.

VIII.

Your complainant further avers that said act of 1882 as provided in Section 1 thereof, was to become effective upon the consent thereto by the Omaha tribe of Indians expressed in open council, and which said consent from the Omaha tribe of Indians was given on the 5th day of May, 1883, and appears in the records of the Commissioner of Indian Affairs as follows, to-wit:

3 United States Indian Service.

Omaha, Nebraska, Agency.

May 5th, 1883.

I certify on honor that on this 5th day of May, 1883, the Omaha tribe of Indians being assembled in open council, the act of Congress, entitled: "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the state of Nebraska, and for other purposes," approved August 7th, 1882, was read and fully explained to them by the Official Interpreter, and that they did then and there consent to and approve the provisions of the said act of Congress.

GEO. N. WILKINSON,
U. S. Indian Agent.

Witness:
WILLIAM C. McBEATH, *Clerk.*

Interpreter's Certificate.

I certify on honor that the act of Congress entitled, "An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes," approved August 7th, 1882, was this day read to the Omaha tribe of Indians in open council assembled, and and by me correctly interpreted to them, and that they clearly understood the matter, and conditions thereof before consenting thereto.

JOHN PILCHER,
Interpreter for Omahs.

Witness:
WILLIAM C. McBEATH, *Clerk.*

Omaha Agency, Nebr., May 5th, 1883.

United States Indian Service.

Omaha and Winnebago Agency, Nebr.

May 7th, 1883.

To the Hon. Commissioner of Indian Affairs, Washington, D. C.

SIR: I have the honor to transmit herewith the papers in the matter of the approval of the bill for the sale of the Omaha lands after two days of tedious council and expensive feasting; they approved the bill with this proviso, that I write to the Great
6 Father and ask that he appoint his appraisers friends of the Agent who will listen to him and appraise the lands high so they can get a good price for them. They were quite earnest and emphatic on this point and consider their approval contingent upon the Great Father's attention to their wishes in this matter. I have the honor to state that there will be a great rush for these lands, and in some cases many applicants for the same piece, and that the decision in such case be not contingent upon the fleetest horses or the greatest amount of muscle of the applicant in the scramble for priority, and at the same time to benefit my Indians, I would like that the Honorable Secretary of the Interior,—if consistent with the provisions of the bill—prescribe such regulations as will give the Indians the benefit of competition in the sale.

Very respectfully, your obedient servant,

GEO. N. WILKINSON,

U. S. Indian Agent."

IX.

Your complainant further avers that pursuant to the said Section 8 of said act of 1882, certain of said lands were allotted to the different members of the Omaha tribe of Indians, and which said allotments were approved by the United States acting through its proper officers in July, 1884, and that patents from the United States were issued to the said allottees for the lands so allotted under date of December 28, 1884.

X.

Your complainant further avers that for some reason to your complainant unknown the proper officers of the United States charged with the duty under Section 8 of the Act of 1882 to issue a patent to the Omaha tribe of Indians for the lands, and in the manner and form as in Section 8 of the Act of 1882, provided, failed and neglected to execute, issue and deliver said patent, but your complainant upon advice of counsel avers that the issuance of said patent by the proper officers of the United States was but a ministerial duty and that in law and equity the title to said lands became and was vested in the Omaha tribe of Indians as fully and effectively as if said patent has been issued as in said Section 8 provided.

XI.

That in said Section 8 it was provided: "That from the residue of lands thus patented to the tribe in common, allotments
7 shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, to-wit: within twenty-five years from and after the approval of the allotments which have been made under said Act of 1882, to-wit: twenty-five years from and after July 10, 1884, which would be July 10, 1909.

XII.

That under date of February 8, 1909, the Secretary of the Interior made a report to the House of Representatives relating to allotments of land under Section 8 of the Act of 1882, and relating to the said patent therein provided for, in which among other things the said Secretary reported:

"Allotments on the Omaha Indian Reservation were originally made in accordance with the provisions of the Act of August 7, 1882 (22 Stat. L., 341). Allotments under this Act to 954 members of the tribe were approved by the department on July 11, 1884, and the trust period for such allotment will expire on July 10, 1909. * * * For reasons which *still* the present administration of the department of the Indian office is unable to supply, no patent to the tribal lands was issued in accordance with the direction of Section 8. * * * Section 8 of the Act of August 7, 1882, supra, provided that from the residue of lands to be patented to the tribe in common, allotments should be made and patented to each Omaha child born prior to the expiration of the time during which it was provided that the tribal lands should be held in trust (i. e prior to July 10, 1909, on the constructive hypothesis herein outlined), the individual patent to override the patent to the tribe in common, and the lands so patented to the children to be segregated from the tribal lands. It is worthy of note also that the trust period on the proposed allotments to children was to expire, under the terms of this section, simultaneously with the expiration of the trust period on the tribal lands. No allotments to children have been made under this section. The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the Act of March 3, 1893 (27 Stat. L., 612, 630), which was amendatory in that it gave larger areas to children allotted under the former act, and provided for allotments to all women and children in being on March 3, 1893.

The latter act, however, did not repeal the former, so that
8 there can be no doubt but that the children born since March 3, 1893, have been born into a right to an allotment of 40 acres each under the provision of the Act of August 7, 1882, supra, so long as any is left of the tribal land."

XIII.

Your complainant upon advice of counsel avers that the said Act of March 3, 1893, hereinafter referred to, did not repeal the Act of August 7, 1882, and that under and by virtue of Section 8 of the Act of 1882, each and every child born into the Omaha tribe of Indians after the date of August 7, 1882, including your complainant, became, was and is entitled to make, have and receive an allotment of the lands in the Omaha Reservation, as provided for in said Section 8 of the Act of 1882.

XIV.

Complainant further avers that the Congress of the United States under date of March 3, 1893, passed an act, in which among other things, it is provided (27 Stat., 630):

"That the act of Congress approved August 7, 1882, entitled 'An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes,' be and the same is hereby, amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an alloting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: Provided that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in Sections 6, 7 and 8 of said act, touching allotments and patents to allottees therein mentioned: And, Provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

9 XV.

Your complainant further avers that the purpose and intent of the said amendment of the Act of 1882 by the said Act of March 3, 1893, was to increase the amount of allotments to Indian women and children from one-sixteenth of a section to one-eighth of a section, and to all other persons who had received under the Act of 1882 an allotment of one-sixteenth of a section and living at the time of the Act of 1893, an additional allotment of one-sixteenth of a section, so as to increase the allotment to one-eighth of a section. That it was not the purpose and intent of said Act of 1893 to deprive any member of the Omaha tribe of his or her right to an allotment of lands out of the Omaha Reservation; and complainant avers upon advice of counsel that all members of the Omaha tribe of Indians, including

complainant, were *are* entitled to allotments under the Act of 1882, as therein provided, subject only to the provision as amended in the Act of 1893, to-wit: that if the allotment under the Act of 1882 was limited to one-sixteenth of a section that said allotment should be increased to one-eighth of a section; and further avers upon the advice of counsel that it was not within the power of Congress by the Act of 1893, or otherwise, to take from, or deprive any member of the Omaha tribe of Indians, including this complainant, of the right to an allotment of lands in the Omaha reservation.

XVI.

Your complainant was born on or about the 24th day of Jan. 1895, of parents, who at said time were members of the Omaha tribe of Indians, and your complainant ever since has been a member of said Omaha tribe of Indians, and has been and is entitled to an allotment of lands out of the lands known as the Omaha Reservation, and has caused to be, and has selected for complainant's said allotment the following described lands:

South West ¼ of the South East Quarter of Section One, Town. 25, Range 9, East of the 6th Principal Meridian, in Thurston County, Nebraska, being a part of the Omaha Reservation, and has caused to be made, and has made an application to the Department of the Interior to have said allotment to his complainant approved. That, notwithstanding the fact that this complainant is entitled to have said allotment of lands so made approved, and the same patented to complainant, as provided by law in that behalf, under the treaties and acts of Congress hereinbefore referred to, the defendant by and through its Interior Department has wrongfully neglected and failed to recognize or approve the said allotment, and has wrongfully failed, neglected and refused to issue and deliver unto this complainant a patent for the said land, although duly requested so to do, but this complainant for want of information in that behalf is unable to aver what particular reasons if any the Interior Department may have for wrongfully neglecting and refusing to approve the said allotment, and for wrongfully neglecting and refusing to issue a patent to this complainant for the said lands so selected.

XVII.

Your complainant further shows to your Honors that by an Act of Congress, approved February 6, 1901, (13 U. S. Stat. 760) it is provided, that all persons, who are in whole or in part of Indian blood or descent, who are entitled to allotment of land under any act of Congress, or who claims to be so entitled under any allotment act or any grant made by Congress, may commence, prosecute or defend an action, suit or proceeding in relation to their rights thereto in a proper court of the United States, and that the said Act of Congress gives this court jurisdiction to take cognizance of any action, suit or proceeding arising within their respective jurisdiction involving the right of any person in whole or in part of Indian blood or

descent, to any allotment of land under any treaty or law of the United States; and said act further provides that a judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him; which said Act of Congress was published by authority of the United States in the 28th vol. of the Statutes at Large on page 305, and which said act has been amended *be* re-enactment duly approved by the President of the United States, February 6, 1901, to which for greater certainty your complainant refers.

Wherefore, your complainant shows to your Honors, that your complaint is without a remedy at law, and is remediless in the premises, unless relieved by your Honors sitting as a court of equity, and therefore prays the aid of this Honorable Court in the premises, and that said defendants, the United States of America may be

11 required to answer your complainant's bill, but answer under oath being expressly waived, and that upon a final hearing in this case it may be adjudged and decreed that the complainant is entitled to have the lands hereinbefore described by the complainant selected for an allotment out of the lands of the Omaha Reservation to be in all things approved and confirmed, and that a certified copy of the decree approving and confirming the said allotment of land to the complainant may be duly certified to the Secretary of the Interior.

May it please your Honors to grant unto your complainant a writ of subpœna to be issued under the seal of this court directed to the United States of America defendant, therein and thereby commanding the defendant on a day certain, and under a certain penalty therein to be limited to be and appear before this court, and then and there to answer all and singular the premises, and to stand to and abide and perform such order and decree therein as the court shall enter.

JNO. L. WEBSTER,
Solicitor for Complainant.

STATE OF NEBRASKA,
County of Thurston, ss:

Samuel Gilpin, being first duly sworn deposes and says, that he is the father & next friend [—] Mary Gilpin, a minor, complainant therein, and that the facts stated in the foregoing petition are true except as to such matters as are stated upon information and belief or advice of counsel, and as to such matters the complainant believes the same to be true.

SAMUEL GILPIN.

Subscribed in my presence and sworn to before me this 22nd day of July, 1912.

[SEAL.]

HIRAM CHASE,
Notary Public.

Endorsed: Filed in the District Court on February 5, 1913.

(Defendant's Motion to Dismiss Bill of Complaint.)

Comes now the United States of America, by F. S. Howell, United States Attorney, and A. W. Lane, Assistant United States Attorney, for the District of Nebraska, and moves the dismissal of the
12 above entitled cause for the reason that in point of law arising upon the face of the bill, the allegations of fact contained in said bill are insufficient to constitute a valid cause of action in equity in favor of the plaintiff and against said United States of America.

UNITED STATES OF AMERICA,
By F. S. HOWELL,
U. S. Attorney.
A. W. LANE,
Asst. U. S. Attorney.

Endorsed: Filed in the District Court on April 18, 1913.

(Order, February 21, 1917, Overruling Defendant's Motion to Dismiss Bill of Complaint.)

September Term, 1916.

Before Judge Woodrough.

It is ordered by the Court, that the motion of the defendant to dismiss the above entitled cause be, and the same is, hereby overruled. Defendant excepts. The defendant is given until April 22, 1917, to answer.

(Answer.)

The United States of America, by T. S. Allen, United States Attorney, and Howard Saxton, assistant U. S. Attorney, for answer to the bill of complaint filed by the plaintiff herein alleges:

First. It admits paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 11, 12 and 14 of the bill of complaint filed herein.

Second. It admits the first three lines and the first three words of the fourth line ending with the word "America" of the third paragraph of said bill of complaint, but denies each and every other allegation of said paragraph three.

Third. It denies each and every allegation contained in paragraph 13 and 15 of said bill of complaint.

Fourth. It admits all of paragraph 17 of said bill of complaint except the prayer thereof, which commences with the word "wherefore" being the first word in the first sub-division of said paragraph 17 on page 14 of said bill of complaint, all of which prayer beginning with said word to the end of said paragraph 17, defendant denies each and every allegation thereof.

Fifth. For answer to paragraph 10 of bill of complaint, it admits that it did not issue a patent to the Omaha Tribe for the
13 lands as provided in Sec. 8 of the Act of Congress of August 7, 1882 (22 Stat. 341) but it denies each and every other allegation of said paragraph ten.

Sixth. It admits that plaintiff was born on or about the date alleged in the bill herein and that the parents of complainant were members of the Omaha Tribe of Indians, and complainant was since and now is a member of said Omaha Tribe of Indians but denies each and every other allegation of said paragraph 16.

Seventh. It denies each and every allegation contained in said bill of complaint except that which is herein specifically admitted.

Eighth. The United States of America for further answer to the bill of complaint herein avers that Congress upon the petition and request of the aforesaid Omaha Tribe of Indians and the Council of said tribe of Indians under date of May 11, 1912 (37 Stat. L. Pt. 1, p. 111) passed an act in the words and figures following:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved: Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised [value/] thereof: And, provided further, that prior to such appraisement and sale, any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River shall be permitted to relinquish such allotment, and select lieu lands of equal area from the unallotted tribal lands, the lands so relinquished to become a part of the unallotted tribal lands and subject to appraisement and sale under the terms of this Act.

Sec. 2. That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this act, the following tracts of land for the purposes designated; forty-nine acres of the land
14 now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious and educational purposes; two acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of

the State Historical Society of Nebraska; Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for townsite purposes one hundred and sixty four acres other than the forty nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys and parks, the lots to be appraised and sold under the terms of this Act, and the streets, alleys and parks are [hereby] dedicated for public use; Provided, further, that the lands allotted, those retained or reserved, and the surplus lands sold, set aside for townsite purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

Sec. 3. That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this act, who have not received allotments of land under the Acts of August seventh, eighteen hundred and eighty two (twenty-second statutes at large, page three hundred and forty one) and March third, eighteen hundred and ninety three (twenty third United States Statutes at Large, page six hundred and thirty) and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and [final].

Sec. 4. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands."

Ninth. That none of the lands set forth and described in said bill of complaint and which plaintiff seeks to have allotted, come within any of the exceptions of the aforesaid act of Congress.

Tenth. That by virtue of the Acts of Congress relative to the Omaha Tribe of Indians of March 16, 1854 (10 Stat. 10043) of March 6, 1865 (14 Stat. 667) of August 7, 1882 (22 Stat. 341 of March 3, 1893 (27 Stat. 630) and of May 11, 1912 (37 Stat. 111) all of the unallotted lands on the Omaha Indian Reservation in the

State of Nebraska are to be sold at public sale under such rules and regulations as the Secretary of the Interior may prescribe and at the time plaintiff filed the bill of complaint herein in this court, and instituted this action herein, there were no lands on the Omaha Reservation in the State of Nebraska subject to allotment to the members of the Omaha Tribe of Indians and there were no lands on said Reservation belonging to said Omaha Tribe of Indians subject to allotment, and the lands described and asked to be allotted plaintiff, in the bill herein were not at the time said bill was filed subject to allotment and said lands are not now subject to allotment.

Eleventh. That the defendant holds the title and control of the lands set forth and described in plaintiff's bill of complaint in trust for said Omaha Tribe of Indians collectively and individually as their rights have been from time to time determined by the Secretary of the Interior of the United States, and by the several acts of Congress passed in relation thereto as above set forth, and is charged with the duty of protecting the rights of said tribe and the individual members thereof in the use and occupancy of said lands and in and to the rents and profits therefrom, and from the proceeds of the sale of said lands as provided in the aforesaid Act of Congress of May 11, 1912.

16 Wherefore defendant prays that the allegations and prayer of plaintiff's bill of complaint filed herein be denied and that defendant may go hence without day and recover its costs herein expended.

T. S. ALLEN,
United States Attorney.
HOWARD SAXTON,
Assistant U. S. Attorney.

O. C. ANDERSON,
Of Counsel.

Endorsed: Filed in the District Court on April 25, 1917.

(Hearing March 30, 1918.)

(*Case Consolidated for Trial with Case of Hiram Chase, a Minor, etc., vs. United States of America, No. 11-Z, Equity, and Other Pending Indian Allotment Cases.*)

September Term, 1917.

Before Judge Woodrough.

This cause came on for trial to the Court, the parties hereto appearing by their respective attorneys; testimony is heard and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are postponed until April 3, 1918. For the purpose of trial it is ordered that this case be consolidated with No. 11-Z and other pending Indian Allotment cases.

(Hearing April 3, 1918.)

April Term, 1918.

Before Judge Woodrough.

This day this cause came on for further hearing, the parties hereto appearing by their respective attorneys; further testimony is heard and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until April 5, 1918.

(Hearing April 5, 1918.)

April Term, 1918.

Before Judge Woodrough.

This day this cause came on for further hearing the parties appearing by their respective attorneys; testimony is heard and said cause is continued for final argument and submission to May 6, 1918.

17 (*Decree of the District Court, July 27, 1918.*)

April Term, 1918.

Before Judge Woodrough.

Case No. 3. Equity.

MARY GILPIN, Minor, etc.,

vs.

UNITED STATES OF AMERICA.

This cause having heretofore, on the 13th day of May, A. D. 1918, been argued and submitted to the court upon the bill of complaint, the answer of the United States of America, defendant, and the evidence, and the Court being fully advised in the premises doth find on the issues joined, in favor of the said defendant.

The Court further specially finds that all of the questioned signatures of Indians to petitions on file in the Department of the Interior, in Washington, D. C., photostat copies of which have been produced herein in evidence, are the valid signatures of said Indians to said petitions.

It is therefore ordered, adjudged and decreed, that this cause be and the same is hereby dismissed and that the defendant, United States of America, go hence without day; that the costs herein be taxed to the complainant and that the defendant have execution to

recover its costs herein expended. To all of which findings and decree the complainant herein excepts.

(*Assignment of Errors.*)

Now comes the complainant and files the following assignment of errors upon which she will rely upon her appeal from the decree of this Court entered in the above entitled cause.

I.

The United States District Court for the District of Nebraska, Omaha Division, erred in entering its decree of dismissal of the complainant's bill and in entering judgment for the defendant.

II.

The Court should have found under the pleadings and evidence that the complainant was entitled to the relief prayed for and
18 should have entered a decree finding that the complainant was entitled to an allotment of the lands described in the complainant's bill of complaint.

In order that the foregoing assignment of errors may be and appear of record, the complainant presents the same to the Court and prays that disposition may be made of the same as by law in such cases made and provided; and complainant prays a reversal of the order and decree of dismissal of complainant's bill of complaint entered by said Court.

JOHN LEE WEBSTER,
HIRAM CHASE,
Solicitors for Complainant.

Endorsed: Filed in the District Court on July 27, 1918.

(*Petition for Appeal.*)

The above named complainant feeling aggrieved by the order and decree entered in the above entitled cause wherein and whereby it was ordered, adjudged and decreed that the complainant's bill of complaint be dismissed at complainant's costs, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said order and decree was made, be duly authenticated and transmitted to the United States Circuit Court of Appeals for the Eighth Circuit.

JOHN LEE WEBSTER,
HIRAM CHASE,
Solicitors for Complainant.

Endorsed: Filed in the District Court on July 27, 1918.

(Order Allowing Appeal.)

On motion of John Lee Webster, Solicitor for Complainant, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final decree heretofore entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony and of all proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for
19 the Eighth Circuit, and that a bond on appeal be fixed at the sum of $500.00 the same to act as a bond for costs.

J. W. WOODROUGH,
United States District Judge.

Endorsed: Filed in the District Court on July 27, 1918.

(Citation and Acceptance of Service.)

THE UNITED STATES OF AMERICA:

To United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, wherein Mary Gilpin, a minor, by her next friend Samuel Gilpin, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, this 29th day of July, A. D. 1918.

J. W. WOODROUGH,
United States District Judge, District of Nebraska.

Service of this Citation accepted this 29th day of July A. D. 1918.

UNITED STATES OF AMERICA,
Appellee,
By HOWARD SAXTON,
Its Asst. Attorney.

Endorsed: Filed in the District Court on July 29, 1918.

(Bond on Appeal.)

Know all men by these presents: That we, Mary Gilpin a minor by her next friend Samuel Gilpin, and L. C. Brownrigg and W. E. Rogers, are held and firmly bound unto United States of America,

in the full and just sum of five hundred dollars ($500.00), to be paid to the said United States of America, its heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 21st day of September, A. D. 1918.

Whereas, lately at the April 1918 term A. D. of the District Court of the United States for the District of Nebraska, in a suit depending in said Court between Mary Gilpin a minor by her next friend Samuel Gilpin, plaintiff and United States of America defendant a Decree was rendered against said plaintiff and the said plaintiff has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a Citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said Mary Gilpin, a minor by her next friend Samuel Gilpin, shall prosecute said appeal to effect, and answer all damages and costs if she fail to make good her plea, then the above obligation to be void, else to remain in full force and virtue.

MARY GILPIN, *A Minor*,
By Her Next Friend, SAMUEL GILPIN. [SEAL.]
By JOHN LEE WEBSTER,
Her Attorney.
L. C. BROWNRIGG. [SEAL.]
W. E. ROGERS. [SEAL.]

Sealed and Delivered in Presence of
JOHN NICHOLSON.

Approved by
J. W. WOODROUGH, *Judge*.

Endorsed: Filed in the District Court on Sept. 21, 1918.

(*Praecipe for Transcript.*)

To the Clerk of said Court:

Please prepare transcript in the above entitled action, for the Circuit Court of Appeals, Eighth Circuit, same to consist of the following:

1. Bill of Complaint.
2. Motion of defendant to dismiss;
3. Order overruling last above;
4. Answer;
5. Trial proceedings consolidation with other cases and Decree;

21 6. Assignment of errors;

7. Petition for Appeal;

8. Order Allowing Appeal;

9. Citation;

10. Bond;

11. Statement of the Evidence with a stipulation of parties and Certificate of the Court;

12. Precipe for transcript;

13. Clerk's certificate.

MARY GILPIN, *A Minor,*
By Her Next Friend, SAMUEL GILPIN,
Appellant,
By JOHN LEE WEBSTER,
Solicitor.

Copy of the foregoing Precipe received by me on this 21st day of September, A. D. 1918.

HOWARD SAXTON,
Assistant U. S. Attorney.

Endorsed: Filed in the District Court on Sept. 21, 1918.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify that pursuant to the order of court and in compliance with the Precipe, a copy of which is found on page 30 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings on file and of record, in the case of Mary Gilpin, a minor by her next friend Samuel Gilpin, vs. United States of America, No. 3 Equity, except the "Statement of the Evidence with Stipulation of parties and Certificate of the Court" which will be found attached to the transcript on appeal in the case of Hiram Chase Jr., a minor by his next friend Hiram Chase vs. United States of America, No. 11 "Z."

22 That a copy of the Citation, duly certified, has been lodged and remains in my office as such Clerk.

Witness my hand and the seal of said Court at Omaha in said District this 26th day of September, A. D. 1918.

[Seal U. S. Dist. Court, Dist. of Nebr., Omaha, Div.]

R. C. HOYT, *Clerk.*
By JOHN NICHOLSON, *Deputy.*

Filed Sep. 30, 1918. E. E. Koch, Clerk.

(Certified Copy of Order of District Court Granting Leave to Amend the Description of the Real Estate in the Bill of Complaint by Interlineation and Stipulation, that Same May be Printed and Made a Part of the Record, etc.)

On application of the complainant leave is hereby granted to amend the description of real estate by interlineation in the bill of complaint herein so as to read as follows:

Southwest quarter of the Southeast quarter (SW. ¼ SE. ¼ of Section one (1), township twenty-five (25), range nine (9) East of the 6th P. M. in Thurston County, State of Nebraska.

DISTRICT OF NEBRASKA, *ss:*

I, R. C. Hoyt, Clerk of the District Court of the United States within and for the District of Nebraska, hereby certify the above to be a true and correct copy of an order of court entered of record in my office in the above entitled action on the 21st day of August, A. D. 1918, being one of the days of the April 1918 term of said Court, Hon. J. W. Woodrough, presiding judge.

Witness my hand and the seal of said Court at Omaha in said District this 5th day of December, A. D. 1918.

[SEAL.] R. C. HOYT, *Clerk.*
By JOHN NICHOLSON, *Deputy.*

23 *(Stipulation.)*

The above order having been omitted from the transcript by overright, we agree the same shall be printed and made a part of the record in the case now pending in the United States Circuit Court of Appeals.

JOHN LEE WEBSTER,
For Appellant.
HOWARD SAXTON,
Asst. U. S. Atty.

Endorsed: Filed in the U. S. Circuit Court of Appeals, December 9, 1918.

24 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(Appearance of Counsel for Appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5284.

MARY GILPIN, a Minor, by Her Next Friend, SAMUEL GILPIN,
Appellant,

vs.

UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Appellant.
JOHN LEE WEBSTER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Oct. 5, 1918.

(Appearance of Mr. T. S. Allen and Mr. Howard Saxton as Counsel for Appellee.)

The Clerk will enter *my* appearance as Counsel for the Appellee.
T. S. ALLEN,
United States Attorney.
HOWARD SAXTON,
Asst. U. S. Atty.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Nov. 23, 1918.

25 *(Appearance of Mr. O. C. Anderson as Counsel for Appellee.)*

The Clerk will enter my appearance as Counsel for the Appellee.
O. C. ANDERSON,
Atty. for Omaha Tribe of Indians.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 30, 1919.

(*Order of Submission.*)

September Term, 1919.

Thursday, September 4, 1919.

No. 5283.

HIRAM CHASE, JR., a Minor, etc., Appellant,

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Nebraska.

No. 5284.

MARY GILPIN, a Minor, etc., Appellant,

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Nebraska.

And

No. 5320.

THOMAS BUTLER, Appellant,

vs.

UNITED STATES OF AMERICA et al.

Appeal from the District Court of the United States for the District of Nebraska.

26 These causes, Nos. 5283, 5284 and 5320, having been called for hearing in their regular order, reargument was commenced by Mr. John Lee Webster for the appellants Chase and Gilpin in Nos. 5283 and 5284, and for the appellee Hallowell in No. 5320; continued by Mr. T. S. Allen, United States Attorney, and concluded by Mr. O. C. Anderson, Attorney for the Omaha Tribe of Indians, for the United States of America in each of the cases.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Court and the briefs of counsel filed herein.

27 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1919.

No. 5284.

MARY GILPIN, a Minor, by Her Next Friend, SAMUEL GILPIN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the District of Nebraska.

Mr. John Lee Webster (Mr. Hiram Chase was with him on the brief), for appellant.

Mr. T. S. Allen, United States Attorney, and Mr. O. C. Anderson, Attorney for Omaha Tribe of Indians (Mr. Frank A. Peterson, Assistant United States Attorney, was with them on the brief), for appellee.

Before Carland and Stone, Circuit Judges, and Elliott, District Judge.

CARLAND, *Circuit Judge,* delivered the opinion of the Court.

This case is ruled by our decision in Chase, Jr. v. United States, this day decided.

Decree affirmed.

Filed November 21, 1919.

28 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1919.

Friday, November 21, 1919.

No. 5284.

MARY GILPIN, a Minor, by Her Next Friend, SAMUEL GILPIN, Appellant,

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

November 21, 1919.

(*Petition for Appeal to Supreme Court U. S.*)

The above named appellant, Mary Gilpin, a minor, by her next friend, Samuel Gilpin, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a decree and judgment therein was rendered on the 21st day of November, 1919, affirming the decree of the District Court of the United States for the District of Nebraska, Omaha Division, and that the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum of Three thousand ($3,000) Dollars, and that the cause is one in which the said

29 United States Circuit Court of Appeals for the Eighth Circuit has rendered a final judgment and decree. That this is not a case in which the original jurisdiction of the United States District Court for the District of Nebraska was dependant upon the fact that the parties to the suit or controversy, were citizens of different States, but that the jurisdiction of said Court was involved, and the facts averred in the Bill of Complaint were bottomed upon averment that the case was one arising under Treaties heretofore made between the United States and the Omaha Tribe of Indians, and under statute laws of the Congress of the United States relating to Omaha Indian Reservation, and the allotment of lands to the members of the Omaha Tribe of Indians, including this complainant; to-

wit: That the suit is one by the appellant, claiming the right to an allotment, as a member of the Omaha Tribe of Indians, of the South West ¼ of the South East quarter of Section One, Town. 25, Range 9, East of the 6th Principal Meridian, in Thurston County, Nebraska. That the United States District Court for the District of Nebraska, Omaha Division, and United States Circuit Court of Appeals for the Eighth Circuit, by their respective judgments and decrees, have held by the construction which they have respectively put on an Act of Congress of May 11, 1912, that the lands in Omaha Indian Reservation are no longer subject to allotment, and that by reason whereof, the appellant herein is not entitled to an allotment of the lands by him claimed.

Wherefore, the said appellant prays that an appeal be allowed him in the above entitled cause, directed to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, to send a record of the proceedings in said case, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in this proceeding may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JOHN LEE WEBSTER,
Solicitor and Attorney for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

30 (*Assignment of Errors on Appeal to Supreme Court U. S.*)

I. Whereas, the United States Circuit Court of Appeals for the Eighth Circuit, had heretofore decided on a former appeal in the suit of Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, Appellant, vs. United States of America, Appellee, 238 Fed. 887, that Hiram Chase, Jr. was born into, and entitled to, an allotment out of the lands of the Omaha Indian Reservation, under the provisions of Section 8 of an Act of Congress, under date of Aug. 7, 1882, (22 Stat. 341); that said United States Circuit Court of Appeals should have adhered to said ruling and judgment on the second appeal in the Chase case, both as a matter of principle and as a matter of law, and that said judgment and decree of said Court in Chase v. United States, 238 Fed. 887, became and was the law of the case, and the parties litigant became and were bound thereby.

II. At the time when the Chase case was first argued and determined in the United States District Court for the District of Nebraska, and at the time when the case was argued and submitted in the United States Circuit Court of Appeals for the Eighth Circuit, the Department of Justice of the United States was then and there fully advised of the Act of May 11, 1912, authorizing the sale of the Omaha Indian Reservation, (said arguments, judgments, and decrees being long after the passage of said Act of Congress of May 11, 1912), and that the Department of Justice, in the preparation for the defense to be made by the United States to the claims of the

different members of Omaha Tribe of Indians, to allotments of lands in the Omaha Indian Reservation under the provision of Section 8 of the Act of Aug. 7, 1882, did have under consideration the said act of May 11, 1912, as a possible defense thereto, and upon mature consideration decided not to, and did not, make claim that said Act of May 11, 1912, either superseded or repealed the Act of Aug. 7, 1882, and whereas the United States Circuit Court of Appeals for the Eighth Circuit, upon said appeal, ruled that the said Act of
31 March 3, 1893, (27 Stat. 630), did not repeal the Act of Aug. 7, 1882, all the parties to said proceeding became bound by said judgment and decree of said Court.

III. The United States was at liberty, upon the first trial in the United States District Court, and upon the former appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to insist that the Act of May 11, 1912, operated to repeal the Act of 1882; and whereas, said defense was then and there available, but not made, the United States became, was and is estopped by its conduct in the premises, from changing its position, and from insisting, on the second appeal to the United States Circuit Court of Appeals, Eighth Circuit, that the Act of May 11, 1912, repealed the Act of Aug. 7, 1882.

IV. The District Court of the United States for the District of Nebraska, Omaha Division, was bound by the judgment, decree and mandate from the United States Circuit Court of Appeals for the Eighth Circuit, in Chase v. United States, 238 Fed. 887, and the said United States District Court had no authority, power, or jurisdiction to depart therefrom, or to modify or reverse said judgment, decree and mandate of the United States Circuit Court of Appeals for the Eighth Circuit.

V. United States District Court of the United States for the District of Nebraska, and United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged, and decreed, that the Act of May 11, 1912, did not operate to repeal Section 8 of the Act of August 7, 1882, and should have found, adjudged, and decreed, that the appellant herein was born into, and entitled to an allotment of land out of Omaha Indian Reservation, under Section 8 of the Act of August 7, 1882.

VI. The United States District Court for the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged and decreed that under the provisions of Section 8 of said act of 1882; that at the expiration of the twenty-five year trust period in said section provided for, which expired July 10, 1909, that the United States thereby and
32 thereunder agreed to, and was bound to convey by patent, to said Omaha Tribe of Indians, in fee, discharged of said trust, and free from all charges and incumbrances whatever, the lands then remaining of said Omaha Indian Reservation; and that the neglect and failure of the proper officers of the United States to execute and deliver said patent, did not operate to defeat the Omaha

Tribe of Indians of the legal title, in fee, to the lands of said Omaha Indian Reservation.

The said United States Circuit Court of Appeals for the Eighth Circuit should have adhered to what it said in Chase v. United States, 238 Fed. 887-890:

"The trust period of 25 years for such allotment would therefore expire on July 10, 1909. The United States failed to issue the patent to the tribe, as provided in section 8 of the act of 1882; but this is conceded to have been an unimportant omission of a ministerial duty only, and that the rights of the members of the tribe therein are not affected by the omission."

and whereas, said trust period expired and said title vested in said Omaha Tribe of Indians some three years before the passage of the Act of May 11, 1912, that, therefore, the said Act of May 11, 1912, was wholly inoperative and of no effect, and in no way operated to cut off the right of the complainant to a right of allotment as provided for in Section 8 of the Act of August 7, 1882, as first held, adjudged and determined in Chase v. United States, 238 Fed. 887.

VII. United States Circuit Court of Appeals should have found and decreed that the complainant herein was and is entitled to an allotment of the lands claimed by him in his bill of complaint set forth.

JOHN LEE WEBSTER,
Solicitor for Appellant.

33 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(*Affidavit as to Amount in Controversy.*)

STATE OF NEBRASKA,
County of Douglas, ss:

James E. Malloy and Leslie S. Strain, being each first duly sworn upon his oath says that he is personally acquainted with, and knows the value of the real estate described in the Bill of Complaint, in the above entitled cause, to-wit: South West ¼ of the South East quarter of Section One, Town. 85, Range 9 East of the 6th Principal Meridian, in Thurston County, Nebraska, and that the reasonable value of said tract of land is the sum of Four Thousand ($4,000) Dollars, exclusive of interest and costs.

Affiants further state that there are a number of other like cases pending in the District Court of the United States for the District of Nebraska, Omaha Division, aggregating eight-six (86) in number, and arising out of similar facts and involving the same questions of law which are presented in the petition of the appellant herein, and that the value of the lands involved in all of said suits exceeds the sum of Five Hundred Thousand ($500,000) Dollars, exclusive of interest and costs; that in each of said pending suits stipulations have been signed and approved by the Judge of the District Court, and

filed therein, to the effect that each and all of said several suits shall abide by the final judgment and mandates in this pending appeal.

JAMES E. MALLOY.
LESLIE S. STRAIN.

Subscribed in my presence and sworn to before me, this 10th day of January *1*, 1920.

[SEAL.] S. DANAHEY,
Notary Public.

34 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(Bond on Appeal to Supreme Court U. S.)

Know all men by these presents that we, Mary Gilpin, a minor, by her next friend, Samuel Gilpin, as principals, and Waldo E. Whitcomb and L. C. Brownrigg as sureties are held and firmly bound unto the United States of America in the sum of Five hundred dollars ($500.00), to be paid to United States of America, subject to the following conditions:

Whereas, the appellant in the above entitled cause has sued out an appeal to the Supreme Court of the United States to reverse the decree and judgment rendered and entered in the United States Circuit Court of Appeals for the Eighth Circuit on the 21st day of November, 1919.

Now, Therefore, the condition of this obligation is such that, if the said appellant shall prosecute said appeal to effect, and answer all costs, if it fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and effect.

MARY GILPIN, *A Minor,*
By Her Next Friend, SAMUEL GILPIN,
By JOHN LEE WEBSTER,
Her Solicitor.
WALDO E. WHITCOMB.
L. C. BROWNRIGG.

Approved Jan. 14-'20.
JOHN E. CARLAND,
Circuit Judge.

STATE OF NEBRASKA,
County of Douglas, ss:

Waldo E. Whitcomb and L. C. Brownrigg, being each separately duly sworn, depose and say that they are each owners of real estate within the State of Nebraska and District of Nebraska, of a
35 value exceeding $20,000 over and above their liabilities, free from encumbrance, and subject to execution.

WALDO E. WHITCOMB.
L. C. BROWNRIGG.

Subscribed in my presence and sworn to before me this 12th day of January, 1920.

[SEAL.]

S. DANAHEY,
Notary Public.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

(*Order Allowing Appeal to Supreme Court U. S.*)

It is hereby ordered that an appeal in the above entitled cause to the Supreme Court of the United States, be, and is, hereby allowed as prayed.

JOHN E. CARLAND,
United States Circuit Judge, Eighth Circuit.

January 14, 1920.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1920.

36 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5284.

MARY GILPIN, a Minor, by Her Next Friend, SAMUEL GILPIN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Citation on Appeal.

To United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, 30 days after the date of this Citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein you are appellee, and Mary Gilpin, a minor, by her next friend, Samuel Gilpin, is appellant, to show cause, if any there be, why the decree and judgment rendered against the said appellant, as in his said appeal mentioned, shall not be corrected, and why speedy justice shall not be done to the parties in that behalf.

Witness the Honorable John E. Carland, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 14th day of January, 1920.

JOHN E. CARLAND,
United States Circuit Judge, Eighth Circuit.

Service of above Citation is accepted in behalf of United States of America.

T. S. ALLEN,
United States Attorney.

Dated Jan. 27, 1920.

[Endorsed:] #5284. In the United States Circuit Court of Appeals, Eighth Circuit. Mary Gilpin, a Minor, by Her Next Friend, Samuel Gilpin, Appellant, v. United States of America, Appellee. Citation on Appeal to Supreme Court, U. S. Filed Jan. 29, 1920. E. E. Koch, Clerk.

37 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Mary Gilpin, a minor, by her next friend Samuel Gilpin, was Appellant, and the United States of America was Appellee, No. 5284, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirty-first day of January, A. D. 1920.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 27,469. U. S. Circuit Court Appeals, 8th Circuit. Term No. 714. Mary Gilpin, a minor, by her next friend, Samuel Gilpin, appellant, vs. The United States of America. Filed February 7th, 1920. File No. 27,469.

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No. Oct-Term 1920—242-243

In the Supreme Court of the United States

HIRAM CHASE, JR., A MINOR, BY HIS NEXT FRIEND, HIRAM CHASE, SR.,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
NO. 242

MARY GILPIN, A MINOR, BY HER NEXT FRIEND, SAMUEL GILPIN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
NO. 243

APPEAL FROM UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF APPELLANTS.

HIRAM CHASE,
Of Counsel.

JOHN LEE WEBSTER,
Solicitor for Appellants.

REED PRINTING CO.

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In the Supreme Court of the United States

HIRAM CHASE, JR., A MINOR,
BY HIS NEXT FRIEND,
HIRAM CHASE, SR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

NO. 713.

MARY GILPIN, A MINOR, BY
HER NEXT FRIEND,
SAMUEL GILPIN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

NO. 714.

APPEAL FROM UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

These suits arose under treaties and laws of the United States relating to allotment of lands out of Omaha Indian Reservation, to members of Omaha tribe of Indians.

Hiram Chase, Jr., a member of the tribe, was born December 3, 1895, and prior to May 19, 1910, caused to be selected, and claims an allotment of the West ½ of the Northwest ¼ of Section 25, Township 25, Range 9, east of the 6th P. M. in the State of Nebraska.

Mary Gilpin was born on the 24th day of January, 1895, and prior to August 21, 1912, caused to be selected, and claims an allotment of the Southwest ¼ of the Southeast ¼ of Section 1, Township 25, Range 9, east of the 6th P. M., in Thurston County, Nebraska.

The lands selected *supra* are part of Omaha Indian Reservation. These suits are two of many others of like kind, and it has been agreed that the remaining suits shall abide the final determination of these cases.

The case of *Hiram Chase, Jr.,* was originally submitted to the Court on a general demurrer to the amended petition, which demurrer was sustained by the District Court. From that judgment an appeal was sued out to the United States Circuit Court of Appeals, which held that Hiram Chase, Jr., had a vested right to an allotment in severalty out of the lands of Omaha Indian Reservation, under the Treaty of May 16, 1854, and the subsequent Treaty of March 16, 1865, and the Act of Congress of August 7, 1882, and the Act of March 3, 1893, hereinafter referred to, and which opinion and judgment is reported in the case of *Chase v. United States,* 238 Fed. 887.

Upon the coming down of the mandate, the United States filed answers in the Chase case and in the other like cases then pending, and pleaded an Act of Congress passed May 11, 1912, authorizing the Secretary of the Interior, under conditions therein named, to sell the unallotted lands.

Under said answers some proofs were taken, and the United States District Court again entered judgment for the United States, and against the rights of these Indians claiming allotments of lands out of Omaha Indian Reservation.

From these judgments a second appeal was sued out in the United States Circuit Court of Appeals, which held, in

effect, that the Act of May 11, 1912, operated to terminate the right of members of Omaha Tribe of Indians to claim allotment of lands, and which opinion is found in the record in the case of *Hiram Chase, Jr., v. United States of America*, pp. 101 to 108, and is reported in *Chase v. United States*, 261 Fed. 833, and *Gilpin v. United States*, 261 Fed. 841.

The primary questions presented on this appeal are:

First: Whether these appellants had a vested right to have an allotment of lands out of Omaha Indian Reservation, under the Treaties and Acts of Congress as they existed at the time when said allotments were respectively selected and claimed as of the dates stated *supra*.

Second: Whether the Act of May 11, 1912, was mandatory upon the Secretary of the Interior, commanding him to sell all of the lands unallotted at that date, and therefore operated automatically to cut off the right of allotment from that date forward.

Third: Whether, under the Act of August 7, 1882, the legal title of Omaha Indian Reservation, subject to the right of allotment, was not vested in Omaha tribe of Indians, and that a patent therefor should have been issued by the United States to the said Indian tribe, as in said Act provided, and that, by reason whereof, the United States had no interest in the said lands which could be sold under the Act of May 11, 1912.

The material parts of the Treaties and Acts of Congress referred to are printed *in extenso* in the Appendix to this brief, but attention is here briefly called to what we regard as the crucial features of the Treaties and Acts of Congress.

By the Treaty of March 16, 1854 (see Appendix, p. 44), it is provided in Article 1 that the Omaha Indians *cede* to the United States a portion of the Reservation, and that, as a consideration therefor, it is provided in Article 3 that

"the Omahas relinquish to the United States all claims for money or other thing, under former treaties," provided that the Omahas shall receive from the Government the "unpaid balance of $25,000 appropriated for their use by the Act of the 30th of August, 1851;" and in Article 6 it is provided that allotments may be made to the members of the tribe, and patents issued therefor.

In Article 1 of the Treaty of 1865 (see Appendix this brief, p. 46), the Omaha tribe of Indians *"cede, sell and convey to the United States"* a part of the Reservation.

In Article 2 of said Treaty it is provided that, in consideration whereof, the United States agrees to pay to said Omaha tribe of Indians, $50,000.

In Article 4 of said Treaty it is recited that the Omaha Indians are *desirous of promoting settled habits of industry* and of "abolishing the tenure in common" by which they hold their lands, whereby it is "agreed and stipulated," that out of the remaining portion of the Reservation, allotments of land shall be made to heads of families and male persons of different ages, of specified quantities of lands; that for such allotments certificates shall be issued specifying among other things that the lands *"are for the exclusive use and benefit of themselves, their heirs and descendants."*

Congress passed an Act under date of August 7, 1882 (see Appendix this brief, p. 48), providing for a sale of that part of the Reservation lying west of Sioux City & Nebraska Railway. The material parts of the remaining sections of said Act are as follows:

Sec. 5 of said Act provides:

> "Secretary of the Interior be authorized to *allot* the lands of the Omaha Reservation, and lying east of the said right of way in severalty to the Indians of said

tribe in quantity, as follows: To each *head* of a family *one-quarter* of a section; to each *single* person over eighteen years of age *one-eighth* of a section; to each *orphan* child under eighteen years of age *one-eighth of a section;* and to each *other person* under eighteen years of age *one-sixteenth* of a section; which said allotments to be in lieu of allotments or assignments provided for in the fourth article of the treaty of 1865."

Sec. 6, Act of 1882, provides Secretary of Interior:

"Shall cause patents to issue therefor in the name of the allotees, which patents shall be of *legal effect* and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, etc."

Sec. 7, of Act of 1882, provides:

"That upon the completion of said allotments and the patenting of the lands to said allotees each and every member of said tribe of Indians shall have the benefit of, and be subject to the laws of the State of Nebraska, and said state shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law."

That by Section 8 of said Act of 1882, it is further provided:

"That the *residue* of lands lying east of the said right of way of the Sioux City and Nebraska Railroad, *after all allotments* have been made, as in the fifth section of this act provided, SHALL BE PATENTED TO THE SAID OMAHA TRIBE OF INDIANS, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit of the said Omaha tribe of Indians, and that at the EXPIRATION of said period, the UNITED STATES WILL CONVEY the same BY PATENT TO SAID OMAHA TRIBE OF INDIANS, IN FEE DISCHARGED OF SAID TRUST AND FREE OF ALL INCUMBRANCE WHATSOEVER; *Provided,* That from the *residue* of lands thus patented to the tribe in common, *allotments shall be made* and patented to *each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the*

United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in Section 6 of this Act, touching patents to allotees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common; And, provided further, That these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, *and shall separate the individual allotment from the lands held in common*, which *proviso* shall be incorporated in the patent issued to the tribe; *Provided*, That said Indians or any part of them, may, if they shall so elect, *select the land which shall be allotted to them in severalty* in any part of said reservation either east or west of said right of way mentioned in the first section of this act." Statutes at Large, Vol. 22, p. 341.

Act of 1882 was consented to by Omahas, May 5, 1883, as appears by certificate of Wilkinson, Indian, Agt., and the certificate of John Pilcher, Interpreter, and by the report of the Indian Agent to Commissioner of Indian Affairs under date of May 7, 1883. (Copies of these records set out in Complaint, rec. p. 10 Chase case, and pp. 5, 6, Gilpin case.)

Under Act of 1882 certain lands were allotted and approved July, 1884, and patents issued to allotees December 28, 1884. (See Sec. 6, Report of Secretary of Interior, rec. p. 7, Gilpin case, and rec. pp. 11, 12, Chase case.)

The United States failed to issue the patent in fee to the Omahas, as provided in Sec. 8 of Act of 1882, that the issuing of said patent was but a ministerial duty, and upon failure to perform that ministerial duty, the title of the lands nevertheless become vested in the Omahas as fully as though patent in fee had been issued pursuant to Sec. 8 of Act of 1882. Sec. 8 of Act of 1882, provides:

"*That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the ex-*

piration of the time during which it is provided that said lands shall be held in trust by the United States,"

to-wit, within 25 years from the approval of allotments July 10, 1884, which would be July 10, 1909. Both of the complainants were born prior to the expiration of the trust period named.

Secretary of the Interior February 8, 1909, made report to House of Representatives under Sec. 8 of Act of 1882, in which he said, rec. p. 7, Gilpin case; rec. p. 12, Chase case:

"Allotments on the Omaha Indian Reservation were originally made in accordance with the provisions of the Act of August 7, 1882 (22 Stat. L. 341). Allotments under this Act to 954 members of the tribe were approved by the department on July 11, 1884, and the trust period for such allotments will expire on July 10, 1909. * * * For reasons which the present administration of the department and of the Indian office is unable to supply, no patent to the tribal lands was issued in accordance with the direction of Section 8. * * * Section 8 of the Act of August 7, 1882, *supra* provided that from the *residue* of lands to be patented to the tribe in common, *allotments* should be made and patented to each *Omaha child born prior to the expiration* of the time during which it was provided that the tribal lands should be held in trust *(i. e., prior to July 10, 1909,* on the constructive hypothesis herein outlined), the *individual patents to override the patent to the tribe in common,* and the lands so patented to the children to be segregated from the tribal lands. It is worthy of note also that the trust period on the proposed allotments to children was to expire under the terms of this section, simultaneously with the expiration of the trust period on the tribal lands. No allotments to children have been made under this section. The *only allotments* made from the *residue* of lands after the allotments of 1884 were made under the *terms* of the Act of March 3, 1893 (27 Stat. L. 612, 630), which *was amendatory in that it gave larger areas to children allotted under the former act, and* provided for allotments to all women and children in being on March 3,

1893. The latter act, however, *did not repeal* the former, so that THERE CAN BE NO DOUBT BUT THAT THE CHILDREN BORN SINCE MARCH 3, 1893, HAVE BEEN BORN INTO A RIGHT TO AN ALLOTMENT OF 40 ACRES each under the provision of the Act of August 7, 1882, *supra, so long as any is left of the tribal land.*"

Act of March 3, 1893, did not repeal Act of 1882. By Sec. 8 of Act 1882, each child born after August 7, 1882, became entitled to an allotment as provided under Sec. 8 of the Act of 1882.

Act of March 3, 1893 (27 Stat. 630):

"That the Act of Congress approved August 7, 1882, entitled, 'An Act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes,' be, and the same is hereby, amended so as to *authorize* the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe *born since* allotments of land were made in severalty to the members thereof under the provisions of said act, *and now living*, one-eighth of a section of the *residue* lands held by that tribe in common, *instead* of one-sixteenth of a section, as therein provided, and to allot in severalty to *each allotee under said act*, now *living*, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such *residue* lands; Provided that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in Sections 6, 7 and 8 of said Act, touching allotments and patents to allotees therein mentioned; And, Provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

If these additional allotments and increased allotments shall be made under the act of 1893, why exclude children born since 1893 and why limit to children living in 1893? Evidently this Act of 1893 did not repeal Act of 1882, but was intended to provide for additional allotments.

It was the intent of the Act of March 3, 1893, amending Act of 1882, to *increase* the amount of allotments from one-sixteenth to one-eighth of a section; and to give to all persons who had received an allotment under Act of 1882 of one-sixteenth of a section, and *living* at time of Act of 1893 an additional one-sixteenth of a section, so as to *increase* allotments of all Omahas to one-eighth of a section.

Congress passed an Act under date of May 11, 1912, authorizing the Secretary of the Interior, under conditions named therein, to sell the unallotted lands in Omaha Indian Reservation, which Act of Congress is copied in the answer of the United States, in the Mary Gilpin case, and was relied upon by the United States as a defense in these suits. Said Act of Congress is printed in the Appendix to this brief, pp. 52. Our contentions against this Act of Congress being a defense in this action may be summarized as follows:

(a) That said Act of Congress is merely a grant of authority to the Secretary of the Interior to sell the unallotted lands in the Reservation, and not mandatory.

(b) More than 8 years have passed since the passage of said Act of Congress, and the Secretary of the Interior has not yet sold, nor attempted to sell said lands under said Act, thereby construing it, not as mandatory, but as vesting in the Secretary a *discretion*.

(c) That by Sec. 8 of the Act of 1882, the *legal title* to the lands vested in Omaha tribe of Indians at the expiration of the trust period therein provided for, which expired July 10, 1909, hence the United States had no title or interest in the lands which the Secretary of the Interior could be authorized to sell.

(d) That the complainant, Hiram Chase, Jr., made his application for allotment prior to May 19, 1910, which was about two years before the passage of the Act of

May 11, 1912; and Mary Gilpin made her application and claim for allotment prior to August 21, 1912, at which time no proceedings had been taken by the Secretary of the Interior under said Act of May 11, 1912. Should the Secretary of the Interior afterward attempted to take any action under the Act of May 11, 1912, it would not operate to cut off the prior claims for allotments made under the prior existing Acts of Congress referred to supra.

ASSIGNMENT OF ERRORS.

The complainants severally filed the following Assignment of Errors in the United States District Court for the District of Nebraska:

(1) The United States District Court for the District of Nebraska, Omaha Division, erred in entering its decree of dismissal of the complainant's bill, and in entering judgment for the defendant.

(2) The Court should have found, under the pleadings and evidence, that the complainant was entitled to the relief prayed for, and should have entered a decree finding that the complainant was entitled to an allotment of the lands described in the complainant's bill of complaint.

Assignment of Errors on appeal from United States Circuit Court of Appeals, to the Supreme Court of the United States (see rec. pp. 110, 111, Chase case; rec. pp. 25-27, Gilpin case):

I. Whereas, the United States Circuit Court of Appeals for the Eighth Circuit, had heretofore decided on a former appeal in the suit of Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, Appellant, v. United States of America, Appellee, 238 Fed. 887, that Hiram Chase, Jr., was born into, and entitled to, an allotment out of the lands of the Omaha Indian Reservation, under the provisions of Section 8 of an Act of Congress, under date of Aug. 7, 1882 (22 Stat. 341); that said United States Circuit Court of Appeals should have adhered to said ruling and judgment on the second appeal in the Chase case, both as a matter of principle and as a matter of law, and that said judgment and decree of said Court in Chase v. United States, 238 Fed 887, became and was the law of the case, and the parties litigant became and were bound thereby.

II. At the time when the Chase case was first argued and determined in the United States District Court for the District of Nebraska, and at the time when the case was argued and submitted in the United States Circuit Court of Appeals for the Eighth Circuit, the Department of Justice of the United States was then and

there fully advised of the Act of May 11, 1912, authorizing the sale of the Omaha Indian Reservation (said arguments, judgments, and decrees being long after the passage of said Act of Congress of May 11, 1912), and that the Department of Justice, in the preparation for the defense to be made by the United States to the claims of the different members of Omaha Tribe of Indians to allotments of lands in the Omaha Indian Reservation under the provision of Section 8 of the Act of Aug. 7, 1882, did have under consideration the said Act of May 11, 1912, as a possible defense thereto, and upon mature consideration decided not to, and did not, make claim that said Act of May 11, 1912, either superseded or repealed the Act of Aug. 7, 1882, and whereas, the United States Circuit Court of Appeals for the Eighth Circuit, upon said appeal, ruled that the said Act of March 3, 1893, (27 Stat. 630) did not repeal the Act of Aug. 7, 1882, all the parties to said proceeding became bound by said judgment and decree of said Court.

III. The United States was at liberty, upon the first trial in the U. S. District Court, and upon the former appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to insist that the Act of May 11, 1912, operated to repeal the Act of 1882; and whereas, said defense was then and there available, but not made, the United States became, was, and is estopped by its conduct in the premises, from changing its position, and from insisting, on the second appeal to the United States Circuit Court of Appeals, Eighth Circuit, that the Act of May 11, 1912, repealed the Act of Aug. 7, 1882.

IV. The District Court of the United States for the District of Nebraska, Omaha Division, was bound by the judgment, decree and mandate from the United States Circuit Court of Appeals for the Eighth Circuit, in Chase v. United States, 238 Fed. 887, and said U. S. District Court had no authority, power, or jurisdiction to depart therefrom, or to modify or reverse said judgment, decree and mandate of the United States Circuit Court of Appeals for the Eighth Circuit.

V. United States District Court of the United States for the District of Nebraska, and United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged, and decreed, that the Act of May 11, 1912, did not operate to repeal Section 8 of the Act of August 7, 1882, and should have found, adjudged, and decreed, that the appellant herein was born into, and entitled to an allotment of lands out of Omaha Indian Reservation, under Section 8 of the Act of August 7, 1882.

VI. The United States District Court for the District of Nebraska, and the United States Circuit Court of Appeals for the Eighth Circuit, should have found, adjudged, and decreed, under the provision of Section 8 of said Act of 1882; that at the expiration of the twenty-five year trust period in said section provided for, which expired July 10, 1909, that the United States thereby and thereunder agreed to, and was bound to convey by patent, to said Omaha Tribe of Indians, in fee, discharged of said trust, and free from all charges and encumbrances whatever, the lands then remaining of said Omaha Indian Reservation; and that the neglect and failure of the proper officers of the United States to execute and deliver said patent, did not operate to defeat the Omaha Tribe of Indians of the legal title in fee, to the lands of said Omaha Indian Reservation.

The said United States Circuit Court of Appeals for the Eighth Circuit should have adhered to what it said in Chase v. United States, 238 Fed. 887-890; to-wit,

"The trust period of 25 years for such allotment would therefore expire on July 10, 1909. The United States failed to issue the patent to the tribe, as provided in Section 8 of the Act of 1882; but this is conceded to have been an unimportant omission of a ministerial duty only, and the rights of the members of the tribe therein are not affected by the omission."

And whereas, said trust period expired and said title vested in said Omaha Tribe of Indians some three years before the passage of the Act of May 11, 1912, that, therefore the said Act of May 11, 1912, was wholly inoperative and of no effect, and in no way oper-

ated to cut off the right of the complainant to a right of allotment as provided for in Section 8 of the Act of August 7, 1882, as first held, adjudged and determined in Chase v. United States, 238 Fed. 887.

VII. United States Circuit Court of Appeals should have found and decreed that the complainant herein was and is entitled to an allotment of the lands claimed by him in the bill of complaint set forth.

BRIEF OF THE ARGUMENT.

I.

THE FEDERAL COURT HAS JURISDICTION OF SUITS BY PERSONS OF INDIAN BLOOD CLAIMING RIGHT TO ALLOTMENT OF INDIAN LANDS.

Act of Feb. 6, 1901, 31 Stat. at Large, 760.
Sloan v. United States, 193 U. S. 614.
Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401.
Waldron v. United States, 143 Fed. 413.
Sully v. United States, 195 Fed. 113-121.

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II.

THE APPELLANTS WERE BORN INTO A RIGHT TO ALLOTMENTS UNDER THE ACT OF 1882, AS AMENDED BY THE ACT OF 1893.

This point was so decided on first appeal, in *Chase v. United States,* 238 Fed. 887. That court said (p. 890):

> "The question for decision is whether, in view of the foregoing facts and statutes, the fact that plaintiff in this case *was not born until after* the Act of 1893 was passed, disqualified him to the allotment selected by him."

The court, in its opinion, top page 892, quoted from Section 8 of the Act of 1882 and restated the question at issue as follows:

> "If Chase had been born at any time *prior* to the expiration of the 25 years after the approval of the allotments provided for in the fifth section of the Act (which was in 1884), that is, prior to 1909, he would have, according to the language of Section 8, unaffected by subsequent legislation, been entitled to the allotment of 40 acres of the 80 acres selected by him. The only question then is whether subsequent legislation, interpreted in the light of prior treaties, deprived him of that right."

The court, in speaking of the clause in Sec. 8, of Act of 1882, which provides for allotments, said (p. 892):

"This language is comprehensive and *imperative*. It *commands* that allotments shall be made to every child of the tribe who *may be born* within the specified period of 25 years *ending in 1909*. This, we think, clearly means that so long as *any lands remain unallotted* out of that particular residue, each child born within the specified period *shall have* an allotment. This, we think, would not be questioned except for the provisions of the Act of 1893, upon which the United States especially relies."

The court then quotes the Act of 1893 (see bottom p. 892 and top p. 893), and held that the effect of the Act of 1893 was to increase, and not diminish, the right of allotments, and said (p. 893):

"By this act Congress granted an allotment of *40 acres more* to each allottee living at the time of its passage *who had received but 40 acres*, and it also granted to each Indian woman and to each child of the tribe *born since* allotments of lands had been made who was living at the passage of the Act, a right to an allotment of *80 acres of land*. It increased the grants to individual Indians and contained no provision for decreasing or revoking them, or any of them."

The court ruled that the Act of 1893 did not repeal the Act of 1882, and said in paragraph 2, p. 893:

"The Act of 1882 was certainly *not repealed in terms*, and we do not think it was repealed by implication, because, as a rule, repeals by implication are not favored, and should not be so held unless the implication is clear. In our opinion there is no such clear implication manifested in the Act of 1893, for these reasons:

(1) The Congress did not say the former act or any of its provisions were repealed, but did say that the act was merely 'amended.'

(2) Provisions of doubtful meaning in congressional enactments, relating to Indians, must be construed so far as possible in favor of the Indians, and not against them."

The court (p. 894), in its conclusions, held that the complainant was entitled to an allotment:

"And the conclusion is that the *grant to plaintiff* by the *Act* of 1882 of the right to his allotment of 40 acres of land has never been repealed nor revoked, and it still exists. He has selected 80 acres on the theory that the Act of 1893 granted to him the right to an *additional 40 acres*; but the grant of that Act to children was clearly and expressly limited to children living at the date of the passage of the Act, and it was *passed more than a year before the plaintiff was born.* He does not, therefore, fall within any of the classes to which a grant was made by *that Act*, and he is entitled to only 40 acres of land, but he may take that 40 acres out of the 80 acres he has selected for his allotment by virtue of the provisions of the Act of 1882, with the same right as though he had selected the 40 acres when he selected the 80 acres. The result is that the amended complaint sets forth facts which entitle the plaintiff to relief in equity, and that the decree which dismissed it was erroneous."

We find nothing in this record in this case in conflict with that opinion, but find official reports confirmatory of it. Mr. Garfield, Secretary of the Interior, under date of February 8th, 1909, in a communication to Congress, said (rec. p. 62, fol. 74):

"The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the Act of March 3, 1893 (27 Stat. L. 612, 630), which was amendatory in that it gave larger areas to children allotted under the former act, and provided for allotments for all women and children in being on March 3, 1893. *The later act, however, did not repeal the former*, so that there can be no doubt but that the children *born since March 3, 1893, have been born into a right to an allotment of 40* acres each under the provision of the Act of August 7, 1882, *supra*, so long as any is left of the tribal land."

The Assistant Secretary of the Interior, under date of Feb. 28, 1913, in a report to the Attorney General, relating to the Indian allotments in question, said (near top p. 52):

"The only allotments made from the residue of lands

after the allotments of 1884 were made under the terms of the Act of March 3, 1893 (27 Stat. L. 612, 630), which was *amendatory* in that it gave *larger* areas to children allotted under the former act, and provided for allotments to all women and children in being on March 3, 1893. The *later* act, however, *did not repeal the former*, so that there can be *no doubt* that the children *born since* March 3, 1893, have been *born into a right to an allotment of 40 acres* each under the provisions of the Act of August 7, 1882, *supra*, so long as any is left of the tribal land."

These claimants were born since March 3rd, 1893, and as per the adjudication in *Chase v. United States*, 238 Fed. 887, and the rulings of the Secretary of the Interior, were born into a right to allotment out of the tribal lands.

III.

THE DEPARTMENT OF JUSTICE WAS FULLY ADVISED OF THE ACT OF MAY 11, 1912, AUTHORIZING THE SALE OF THE OMAHA INDIAN RESERVATION, AT THE TIME OF THE ORIGINAL TRIAL OF THIS CASE, AND DID NOT THEN MAKE CLAIM, EITHER IN THE TRIAL COURT, OR IN THE UNITED STATES CIRCUIT COURT OF APPEALS, THAT SAID ACT EITHER SUPERSEDED OR REPEALED THE ACT OF 1882, AS AMENDED BY THE ACT OF 1893.

TO THE CONTRARY, THE UNITED STATES THEN RELIED, AS A DEFENSE, UPON THE SINGLE CLAIM THAT THE ACT OF 1893 REPEALED THE ACT OF 1882, AND THAT THE ACT OF 1893 LIMITED THE RIGHT TO FUTURE ALLOTMENTS TO INDIANS THEN LIVING.

The Act of May 11, 1912, authorizing the Secretary of the Interior to sell the lands, was available as a defense when the original judgments were entered in the District Court, and when *Chase v. United States*, 238 Fed. 887, was submitted. Such defense was not then raised or argued.

The record discloses that the Act of May 11, 1912, was called to the attention of the Department of Justice by the Secretary of the Interior, and was a subject of consideration when these claims for allotments were first filed; and

neither the Attorney General, nor the Secretary of the Interior then claimed that the Act of May 11, 1912, cut off the right to allotment, and such defense was not then made.

Claims for allotment were transmitted to the Secretary of the Interior, by registered mail, August 21, 1912, and February 6, 1913 (rec. pp. 23, 24, 26). It appears from a communication from the Department of the Interior to the Attorney General, under date of February 28, 1913 (rec. pp. 47, 53), that the Attorney General had transmitted to the Department of the Interior, for its report thereon, 18 bills of complaint filed by Indians claiming allotments (including the allotments in controversy, and those remaining in the District Court, under stipulation, to abide the result of this hearing).

In said report the Secretary of the Interior returned the said bills of complaint to the Attorney General, and therein drew specific attention to the Act of March 3, 1893 (rec. p. 50, fol. 59), and to the clause in said Act relating to children "then living," and claiming that said Act of March 3, 1893, cut off the right to allotments under the Act of 1882 (rec. p. 50).

The said report also called the Attorney General's attention to the Act of May 11, 1912, in the following language (rec. p. 51, fol. 60):

> "The Act of May 11th, 1912, *supra, authorizes this* Department to sell the unallotted tribal lands within the Omaha Reservation and to distribute the proceeds *pro rata* among the children belonging to that tribe, etc."

And, again (rec. p. 51, fol. 60):

> "Evidently, therefore, the only equitable distribution that can be made, is by a sale and distribution of the proceeds per capita, which will treat all unallotted members of this tribe alike as the Act of May 11, 1912, *supra*, contemplates."

In said report it is further set down (rec. p. 52):

"The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the Act of March 3, 1893 * * * which was *amendatory* in that it gave *larger areas* to children allotted under the former act, and provided for allotments to all women and children in being on March 3rd, 1893."

"The later Act, however, did not repeal the former, so that there can be *no doubt* that children born since March 3rd, 1893, have been born *into a right to an allotment* of 40 acres each, under the provisions of the Act of August 7th, 1882, *supra*, so long as any is left of the tribal land."

(The last above quotation is in perfect harmony with the judgment in Chase v. United States, 238 Fed. 887.)

It is not stated in the report either that the Act of May 11, 1912, repealed or cut off the right to allotment under the Act of 1882 as amended by the Act of 1893, neither is it claimed that the Act of May 11, 1912, directed the Secretary of the Interior to sell the lands. The Secretary of the Interior only called attention to the Act of May 11, 1912, as authorizing such sale, but *does not state* that the Department of the Interior *either contemplated or intended to make such sale.*

As further evidence that Congress did not intend, by the Act of May 11, 1912, to repeal the right to allotment under the Act of 1882 as amended by the Act of 1893, we refer to another fact in the record, to-wit: The original draft of the Act of 1912 contained a repealing clause (see bottom p. 64), as follows:

"Sec. 6. That all Acts or parts of Acts not consistent with the provisions of this Act are hereby repealed."

That repealing clause was stricken from the Act and is not a part of the Statute of May 11, 1912.

It also appeared in a report from the Secretary of the Interior to Congress, under date of February 8, 1909 (rec. pp. 61, 62), that the Act of 1893 did not repeal the right to allotment under the Act of 1882 (see p. 62, fol. 74):

"The only allotments made from the residue of lands after the allotments of 1884, were made under the terms of the Act of March 3, 1893, which was *amendatory* in that it gave larger areas to children allotted under the former Act, and provided for allotments for all women and children in being on March 3, 1893."

"*The later Act, however, did not repeal the former, so that there can be* no doubt but that children *born since March 3, 1893, have been born into a right to an allotment of 40 acres* each under the provisions of the Act of August 7, 1882, *supra*, so long as any is left of the tribal land."

Here, again, we see that the Secretary of the Interior wrote an opinion to Congress which is in perfect harmony with the opinion in *Chase v. United States*, 238 Fed. 887.

Our objective points on the foregoing excerpts from the record are:

(1) The Secretary of the Interior, and the Attorney General, had before them for consideration the effect of the Act of May 11, 1912, immediately following the filing of the claims for allotments herein in these suits.

(2) That it was not then claimed that the Act of May 11, 1912, repealed the right to allotments under the Act of 1882 as amended by the Act of 1893.

(3) That Congress, when passing the Act of May 11, 1912, struck out Section 6 which provided for repeal.

(4) That the Act of 1893 was only amendatory of the Act of 1882, so that children born after March 3, 1893, if born during the trust period (before July 10, 1909), were born into a right to allotment.

(5) The Department of Justice did not plead, nor invoke, the Act of May 11, 1912, as a defense to the complainant's right to allotments, at the time of the *first* judgment of the District Court, nor on hearing of the *first* appeal in United States Circuit Court of Appeals.

IV.

THE UNITED STATES CANNOT NOW SHIFT ITS GROUND OF DEFENSE.

HAVING RELIED AT THE FIRST TRIAL, AND ON THE FIRST APPEAL, UPON THE SINGLE PROPOSITION THAT THE ACT OF 1893 REPEALED THE ACT OF 1882, AND THEREBY CUT OFF THE RIGHT OF THESE INDIAN CLAIMANTS TO ALLOTMENTS, AND HAVING FAILED IN THAT DEFENSE, CANNOT, UPON THE SECOND TRIAL, ABANDON THAT DEFENSE AND INSIST THAT THE ACT OF MAY 11, 1912, REPEALED THE ACT OF 1882.

It is a settled principle of law and practice that a litigant cannot change his position after a litigation has begun.

Cromwell v. County of Sac, 94 U. S. 351.
Railway Company v. McCarthy, 96 U. S. 258.
Davis v. Wakelee, 156 U. S. 680, 689, 690.
Werlein v. New Orleans, 177 U. S. 390.
Polson Logging Co. v. Neumeyer et al., 229 Fed. 705, 708.
Southern Cotton Oil Co. v. Shelton, 220 Fed. 247.
Smith v. Boston Elevated Ry. Co., 184 Fed. 387.
Oakland Sugar Mill Co. v. Fred W. Wolfe Co., 118 Fed. 239.
Pollitz v. Wabash Ry. Co., 167 Fed. 145.
Brook v. Laurent, 98 Fed. 647.
Kansas Union Life Ins. Co. v. Burman, 141 Fed. 835.
Redinger v. Jones, 68 Kan. 627-637.
Frenzer v. Dufrane, 58 Neb. 432.
Ballou v. Sherwood, 32 Neb. 666.
Lamb v. McConkey, 76 Ia. 47-49.
Foster v. Hinson, 76 Ia. 714.
Cowley County v. Hooker, 70 Kan. 372.
McDermott v. Mahoney, 139 Ia. 292.
Ice Co. v. Lake Lodore Imp. Co., 232 Pa. St. 293-300.
I. C. R. R. Co. v. Seitz, 214 Ill. 350-356.
Sandefur v. Hines, 69 Kan. 168-171.

In *Cromwell v. County of Sac*, 94 U. S. 351, *Mr. Justice Field* said (p. 353):

> "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, *but also as to every ground which might have been presented*, is strictly accurate, when applied to the demand or claim in controversy."

In *Railway Co. v. McCarthy*, 96 U. S. 258, it is said (pp. 267-268):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted to mend his hold. He is estopped from doing it by a settled principle of law."

In *Davis v. Wakelee*, 156 U. S. 680, the quotation from *Railway Co. v. McCarthy*, 96 U. S. 267, 268, is quoted with approval, and a number of other cases cited to the same effect.

Werlein v. New Orleans, 177 U. S. 390, is a case where the court held as stated in the syllabus:

> "That as the city did not set up that defense, although it was open to it to do so, in the former action, it could not set it up now."

In *Smith v. Boston Elevated Ry. Co.*, 184 Fed. 387, it is said (p. 389):

> "A man cannot be permitted to 'blow hot and cold' with reference to the same transaction, or insist at different times, on the truth of each of two conflicting allegations according to the promptings of his private interests."

In *Oakland Sugar Mill Co. v. Fred W. Wolfe Co.*, 118 Fed. 239, it is said (p. 248):

> "To permit the purchaser under such circumstances to change the issues and *propound new defenses, presumably waived without offering to show they had been misled* by the conduct of the contractors or that the defects since discovered were latent, would be contrary to well-settled principles of estoppel."

In *Southern Cotton Oil Co. v. Shelton*, 220 Fed. 247, it is said (p. 256):

> "To permit such change in position is to permit an injustice to the plaintiff in error. * * * He who was silent when he should have spoken cannot subsequently be heard to speak."

In *Brook v. Laurent*, 98 Fed. 647, the court held that a party after taking a position in his pleading, "would not be permitted to change his attitude," and to support its conclusions quotes from *Railway Co. v. McCarthy*, 96 Fed. 258 (p. 655):

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his attack upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

In the present case the United States does not plead ignorance of the Act of May 11, 1912, at time of first appeal, and could not do so, if it would. It knew as much about this Act of 1912, at time of first appeal, as it knows now. No excuse is set up as a justification for this change of position.

THIS DOCTRINE OF ESTOPPEL AGAINST CHANGING THE GROUNDS OF DEFENSE OR SHIFTING POSITIONS, APPLIES TO THE UNITED STATES AS WELL AS TO INDIVIDUALS.

United States v. California & Oregon Land Co., 192 U. S. 355.

Northern Pacific Ry. Co. v. Slaght, 205 U. S. 122.

United States v. California & Oregon Land Co., 192 U. S. 355, is a case where the United States sought to set aside a patent for lands, and to establish the title of the United States. The United States, thereupon, brought a second action to cancel the patent for the same lands, upon the

ground that said lands were excepted from the original grant, as an Indian Reservation.

The court held that the United States could not split up its demand, and that the judgment in the first suit was a bar to a subsequent suit based upon any grounds whatsoever which might have been availed of at the first hearing. It is said (p. 358):

> "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter v. Beale*, 1 Salk. 11; *Trask v. Hartford & New Haven Railroad*, 2 Allen 331; Freeman, Judgments, 4th ed. Secs. 238, 241; and, *a foritori*, he cannot divide the grounds of recovery. Unless the statute of 1899 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patent void, and when the bill was dismissed was barred as to all by the decree. *Werlein v. New Orleans*, 177 U. S. 390; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 212, 216, 217; *Hoseason v. Keegan*, 178 Mass. 247; *Wildman v. Wildman*, 70 Conn. 700, 710; *Sayers v. Auditor General*, 124 Mich. 259; *Foster v. Hinson*, 76 Ia. 714-720; *State v. Brown*, 64 Maryland 199; *Boyd v. Boyd*, 53 App. Div. N. Y. 152, 159; *Schaffer v. Scuddy*, 14 La. Ann. 575; *Henderson v. Henderson*, 3 Hare, 100, 115."

In *Northern Pacific Rg. v. Slaght*, 205 U. S. 122, the court approved and quoted from the opinion in the *California & Oregon Land Co. case*, cited *supra*, as follows (pp. 131-132):

> "And, speaking of the two suits, we said, by *Mr. Justice Holmes:* 'The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way of forfeiture. Now it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee.' And further: 'But the whole tendency of our decisions is to require a plaintiff to

try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter v. Beale*, 1 Salk. 11; *Trask v. Hartford & New Haven Railroad*, 2 Allen 331; Freeman, Judgments, 4th ed., Secs. 238, 341; and, *a foritori*, he cannot divide the grounds of recovery."

Both litigants, upon the first trial, and upon the first appeal, acted upon the assumption that the Act of May 11, 1912, did not repeal the Act of 1882, and therefore submitted the case to the District Court, and to Court of Appeals, on the concrete question; to-wit, were these Indians born into a right of allotment, under the Act of 1882, or was said Act repealed by the Act of 1893?

After these claimants had been put to great expense on that first appeal, and when the question of law had been decided adversely to the Department of Justice, the settled rule of practice and law of estoppel forbids that the Department of Justice can now change its position, or mend its hold, upon a question of law which was considered and available for pleading and consideration at the time of the former hearing.

APPELLANT'S SUGGESTION BY WAY OF ANSWER TO WHAT IS SAID IN CHASE V. UNITED STATES, 261 FED. 833, 839, THAT THE EFFECT OF THE ACT OF MAY 11, 1912, WAS NOT INVOLVED IN THE FIRST APPEAL, AND THAT NEITHER THE APPELLEE, THE UNITED STATES DISTRICT COURT, NOR THE UNITED STATES CIRCUIT COURT OF APPEALS WERE BOUND BY THE RULING OF THE FIRST APPEAL.

(a) The statement of the Court on the last appeal (*Chase v. United States*, 261 Fed. 833, 839) that the demurrer was sustained to the original bill of complaint, and that the Circuit Court of Appeals found on the first appeal that the original bill had been dismissed, *is unimportant*. The change in the equity rules which substituted a motion to dismiss, for a demurrer, is a sufficient explanation of the two statements.

(b) *What was involved in the original complaint? It was whether under the various treaties and acts of Congress the appellants were entitled to, or born into a right of allotment of lands on the Omaha Indian Reservation.* That was the question, and the only question involved in the law suit.

The department of justice did have its attention directly called to that Act of Congress, as appears in the record referred to *supra* in this brief, p. 19, and yet, did not invoke that Act of Congress as repealing the right of these claimants to allotments, until after the United States Circuit Court of Appeals had first ruled (238 Fed. 887) that these Indian claimants were born into a right to an allotment of lands on Omaha Indian Reservation.

The fact that the appellee did not call attention to that fact in the argument, upon the first appeal, is aside from the question we present.

If the Act of May 11, 1912, *ipso facto* cut off the right to allotment, then these Indian claimants were not born into a right of allotment, as ruled on the first appeal.

The long and short of this whole argument is that it is a case where the appellee changed its hold; changed its position, after it learned what was the opinion of the United States Circuit Court of Appeals in 238 Fed. 887.

(c) This case is not like that of *Mutual Insurance Co. v. Hill*, 193 U. S. 551, and other cases made reference to in the opinion of *Carland, Circuit Judge,* in the particular that those cases, by amended pleadings, presented a different statement of *facts.* The former judgment was based upon the pleadings and facts. Where the pleadings and facts were changed, the new judgment would be based upon the new pleadings and new facts. In *Iowa*

Central Ry. Co. v. Walker, 255 Fed. 648, that court said (p. 649):

"By reference to the opinion of this court at the former hearing it will be seen that the only question before the court *then was whether upon the facts, as shown by the record, the last chance doctrine applied.*"

Obviously, all the court intended to decide in that case was that the law, as applied to a certain state of facts, became the law of the case.

The ultimate question remains whether the Act of May 11, 1912, repealed all former acts and took away the right of an Indian to an allotment. This did not depend upon a question of fact, but upon the construction and effect of the last Act of Congress.

In the case at bar, the Act of May 11, 1912, was not susceptible of change. If that Act of Congress cut off the right to allotment, then the first judgment of the Circuit Court of Appeals and its opinion were erroneous. Be that opinion right or wrong, it became the law of the case, and the appellee was bound by it, so far as the Act of Congress related to it. After appellee's defeat upon the first appeal, the appellee was estopped from changing position, or taking a new hold.

In *Messenger v. Anderson*, 225 U. S. 436, this Court only ruled that the Circuit Court of Appeals, on a second trial, was not bound by what it had ruled on a first trial *when the Supreme Court of the State, in the meantime, had construed the will in question, and its effect upon property rights.*

"In our opinion, even apart from the effect of the state judgment as an adjudication it should have been followed, if for no other reason, because at least as against the decision of the Circuit Court of Appeals it was right."

A similar principle was announced in the case of *Lewers & Cooke, Ltd. v. Atcherly*, 222 U. S. 285, a case which

came up from Hawaii, and from which it appears that, in the meantime, the Supreme Court of Hawaii had passed upon the question and due respect was given to its opinion and judgment.

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There is more in this question than the simple one whether the United States Circuit Court of Appeals was bound by its judgment and the law as announced in its first opinion, in the particular that the United States District Court, upon the coming down of the mandate, was bound by the judgment and mandate of the United States Circuit Court of Appeals *and had no jurisdiction to depart therefrom.*

In re Sanford Fork & Tool Co., 160 U. S. 247, 255.

Texas & Pacific R. Co. v. Anderson, 149 U. S. 237, 241.

Ex parte Sibald v. United States, 12 Pet. 488, 492.

Bissell Carpet Sweeper Co. v. Gosher Sweeper Co., 72 Fed. 545.

It was said in *Ex parte Sibald v. United States,* 12 Pet. 488, 492:

"It cannot vary it or examine it for any other purpose than execution, nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it further than to settle so much as has been remanded."

This quotation from 12 Peters, 492, was substantially followed in each of the cases cited *supra.*

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V.

THE ACT OF MAY 11, 1912, DID NOT REPEAL THE ACT OF 1882, OR THE AMENDATORY ACT OF 1893.

IN ANY EVENT, THE ACTS OF 1882 AND 1893, PROVIDING FOR ALLOTMENTS TO MEMBERS OF THE TRIBE, REMAIN IN FULL FORCE, AND CONTINUE TO BE OPERATIVE UNTIL THERE SHALL BE AN ACTUAL SALE OF THE LANDS.

(a) The Act of May 11, 1912, does not make reference to the Act of 1882, or the Amendatory Act of 1893, and does not contain any repealing clause (see Appendix this brief, pp. 53-54). We noted *supra*, that the repealing clause in the original draft of the Act was stricken out (see this brief, p. 20).

(b) There are no words in the Act of May 11, 1912, which, by their terms, take away the continuing right of allotments provided for in the Act of 1882, or the Amendatory Act of 1892.

(c) *Repeals by implication are not favored.*

It is a well settled rule that repeals of statutes are not favored, and that several statutes are to be construed together, if possible, and both be permitted to stand, and harmonized, if possible.

Frost v. Wenie, 157 U. S. 46.

United States v. Hemmer, 241 U. S. 379.

Chase v. United States, 238 Fed. 887, 893.

Hemmer, et al. v. United States, 204 Fed. 898.

In *United States v. Hemmer*, 241 U. S. 379, *Mr. Justice McKenna* said (p. 384):

> "There are no repealing words in the latter Act and, if it repealed the other Act, it must have done so by implication. The implication of such an effect is *not favored* and the character of the Act rejects it."

Sanborn, Circuit Judge, in *Hemmer v. United States*, 204 Fed. 898, used language appropriate to the present situation (p. 906):

"The *first* and most *impressive* characteristic of the later Act, when it is examined to ascertain its effect upon the earlier one, is that it *contains no terms* or words whatever that *indicate* any intent on the part of the legislators to *amend, modify, repeal,* or affect in any way the Act of 1875, the restriction upon alienation there imposed, or any of its other provisions. The Act of 1884 *contains* no *reference* to the Act of 1875, or to any of its provisions, and it does not even contain a clause repealing acts or parts of acts inconsistent with its own provisions."

"Privileges granted to a certain class by special Act are not affected by inconsistent general legislation, unless a contrary intent of the legislative body is clearly expressed or indubitably inferable therefrom. But the special act and the general law stand together, the one as the law of the particular class and the other as the general rule."

We reach that happy result in the case at bar by construing the Act of May 11, 1912, as not amendatory of the Acts of 1882 and 1893, and by construing the phrase "unallotted lands" to mean lands unallotted at such time in the future as the Secretary of the Interior may elect to act under the authority conferred by the Act of May 11, 1912.

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VI.

THE SECRETARY OF THE INTERIOR HAS NEVER TAKEN ANY STEPS TO SELL, NOR MADE ANY DECLARATION THAT HE INTENDS TO SELL THE LANDS OF THE OMAHA RESERVATION, UNDER THE ACT OF MAY 11, 1912.

THE LANGUAGE OF THE ACT IS NEITHER DIRECTORY NOR MANDATORY; IT ONLY AUTHORIZES THE SECRETARY TO SELL; A DISCRETIONARY POWER.

If we are right on the questions of law we have argued in preceding chapters, we have no concern with the question whether the Secretary is required to sell the land under the Act of May 11, 1912, nor whether said Act operates ipso facto to repeal the Act of 1882.

The Act of May 11, 1912, is found in 37 U. S. Stat. 111, and is printed in Appendix this brief, p. 5[illegible].

The first section of said Act provides:

> "That the Secretary of the Interior be, and he is hereby *authorized* to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or so nearly as to the Secretary may seem practicable, and, after such survey and appraisement, *to sell and convey*, in quantities not to exceed one hundred and sixty acres to any one purchaser, *all the unallotted lands of the Omaha Indian Reservation*, in the State of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, That the said land shall be sold to the highest bidder under such *regulations* as the Secretary of the Interior may prescribe, but no part of said land shall be sold at *less than appraised value thereof.*"

It will be noted that the language of the section is not directory nor mandatory; it is but a grant of authority (permission) to be exercised when? Evidently, at the discretion of the Secretary of the Interior.

By Sec. 2 of the Act, the Secretary is "directed to reserve from sale" certain tracts of land. Before a sale can be made, there is to be a survey and appraisement, and the sale is to be conducted under *regulations* by the Secretary of the Interior.

The Secretary of the Interior manifestly understood this statute was *not* mandatory for the reason that eight years have expired since the Act was approved, and the Secretary has *not taken* any steps up to this time looking towards the survey or appraisement of the lands preparatory to a sale; and, so far as appears, the Secretary has no intention of selling the unallotted lands.

The Secretary of the Interior, in his report to the Attorney General under date of February 28, 1913 (rec. p. 56), four times referred to the Act of May 11, 1912. The *first* reference is on rec. p. 55:

"The Act of May 11, 1912, *supra,* authorized this Department to sell the unallotted tribal lands within the Omaha Reservation, and to distribute the proceeds pro rata among the children belonging to that tribe."

The *second* reference is rec. p. 51, fol. 60, wherein he speaks of the sale of the lands under the Act of May 11, 1912, as being the only equitable distribution, etc.

The *third* reference to said Act is found at the bottom of the page rec. 51.

The *fourth* reference appears in the record top p. 53, fol. 63.

The noticeable fact remains that the Secretary of the Interior, in said report, speaks of the Act of May 11, 1912, as "authorizing" the sale of the lands, but nowhere therein is it stated that he regards the Act as directory or mandatory; nor does the report state that the Secretary of the Interior intends to sell.

The Secretary, in that same report, under date of February 28, 1913, and after he had twice referred to the Act of May 11, 1912, stated (rec. p. 52): "There can be no doubt that children born since March 3rd, 1893, *have been born into a right to an allotment* of forty acres under the provision of the Act of August 7th, 1882, *supra, so long as any is left of the tribal lands.*"

So far as appears, the Secretary of the Interior never assumed that the Act of May 11, 1912, either required him to sell the lands, or cut off the right of allotments.

The Attorney General, being fully advised as to the Act of May 11, 1912, by the report of the Secretary of the Interior, elected not to make such defense in these suits *until after the United States Circuit Court of Appeals had handed down its opinion on the first appeal.*

We make the point that the Secretary of the Interior and the Attorney General, by their conduct and statements,

obviously and manifestly construed this Act of May 11, 1912, as granting a discretionary authority and not mandatory.

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If the Act of May 11, 1912, is to be ruled as mandatory, and to cut off all right to allotments, why did not the Secretary proceed immediately to sell the Omaha Indian Reservation?

An illegal claim of Indians to allotments would not excuse the Secretary from performing a mandatory duty under the Act of Congress.

Again, if the Act of May 11, 1912, is mandatory upon the Secretary to sell the Reservation, it is also mandatory upon the Secretary to perform the things set forth in Sec. 2 of said Act and enumerated as follows:

(a) To reserve forty-nine acres for agency and school purposes so long as the need exists.
What is to become of the forty-nine acres when this need no longer exists?

(b) Ten acres reserved for religious and educational purposes. For how long, and what is to be the ultimate disposition?

(c) The Presbyterian mission to be conveyed by patent in fee simple to the State Historical Society of Nebraska. Can the Historical Society compel the execution of that deed?

(d) The Secretary, out of the land reserved for townsite purposes, shall cause the same to be platted into lots, streets, alleys, and parks, the lots to be sold.
Can the Secretary be compelled, by mandamus or otherwise, to lay out the townsite, streets, alleys, and parks? Can a town be created and populated by law, or by an edict from the Secretary of the Interior?

(e) The above are but suggestions in support of our thought that the Act of May 11, 1912, is not mandatory, but investing this cabinet officer with a discretion.

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VII.

THE TITLE IN FEE TO THE RESERVATION, UNDER SECTION 8 OF THE ACT OF 1882, BECAME VESTED IN THE INDIAN TRIBE, AND A PATENT IN FEE SHOULD HAVE BEEN EXECUTED BY THE UNITED STATES JULY 10, 1909.

THE UNITED STATES HAS NO INTEREST OR TITLE IN THE LANDS OF THE RESERVATION WHICH THE SECRETARY COULD SELL OR CONVEY UNDER THE ACT OF MAY 11, 1912.

THE ACT OF MAY 11, 1912, IS THEREFORE OF NO FORCE OR EFFECT.

Sec. 8 of the Act of 1882 provides:

> "That the residue of the lands lying east of the said right of way of the Sioux City and Nebraska R. R. Co., after all allotments had been made, as in the 5th Sec. of this Act provided, *shall be patented to the said Omaha tribe of Indians,* which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented for the period of twenty-five years, in trust, for the sole use and benefit of the said tribe of Indians, and *that at the expiration of said period, will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charges or encumbrance whatever.*"

Secretary Garfield, in his report to Congress under date of February 8, 1909 (rec. p. 61), stated: "The trust period for such allotment will expire June 10, 1909."

The Secretary then quotes the recitals from Sec. 8 of the Act of 1882 providing "that at the *expiration* of such period, the *United States will convey the same by patent to said Omaha tribe of Indians in fee* discharged of said trust and free of all charges and encumbrances whatsoever" (rec. p. 61, fol. 73).

The Secretary could give no reason why the patent had not issued, and *expressed the belief* that a court of law would adjudge that the provision requiring the issuance of said patent in fee to the tribe "*was mandatory*" and said (rec. p 61, fol. 73):

> "For the reasons which the present administration of the department of the Indian office is unable to supply, no patent to the tribal lands was issued in accordance with the direction of the section quoted. It is easy to conceive, however, that a *court of law might hold that the act was mandatory, and required the issuance of a trust patent for the tribal lands,* and that, since this ought to have been done, a constructive trust period went into effect with regard to the tribal lands from the date of the completion of allotments in severalty on July 11, 1884, and would therefore expire on July 10, 1909."

In *Chase v. United States,* 238 Fed. 887, said (p. 890):

> "The trust period of 25 years for such allotment would therefore expire on July 10, 1909. The United States failed to issue the patent to the tribe, as provided in section 8 of the act of 1882; but this is conceded to have been an *unimportant omission of a ministerial duty* only, and that the rights of the members of the tribe therein are not affected by the omission."

This opinion was handed down by *Sanborn, Adams,* and *Carland, Circuit Judges.* It is noticeable that what was said in the last above case on this point is not referred to in the subsequent opinion by *Carland* and *Stone, Circuit Judges,* and *Elliott, District Judge,* in *Chase v. United States,* 261 Fed. 822.

"A court of equity will treat that which ought to have been done, as having been done." *Pilok v. Bednarski,* 230 Mass. 56, 58. "Equity regards that as done which ought to be done." *In re Imperial Textile Co.,* 239 Fed. 775, 777. "Equity regards as done that which ought to be done." *Walker v. Brown,* 165 U. S. 654, 665. "Equity regards substance and not form, and considers that as done which

is required to be done." *Cropley v. Cooper*, 19 Wall. 167-174.

In *Martin v. Martin*, 250 Mo. 539, it is said (p. 550):

> "'Equity looks upon that as done which ought to have been done' (1 Story's Eq. Jur. [12 Ed.] Sec. 648). 'All agreements are considered as performed which are made for a valuable consideration, in favor of persons entitled to insist on their performance. They are to be considered as done at the time when, according to the tenor thereof, they ought to have been performed' (Ibid.). This maxim has been correctly looked upon as the very foundation of all distinctly equitable property rights, of all equitable estates and interests both real and personal (1 Pomeroy's Eq. Jur., Sec. 364). It has been called a 'fruitful maxim.'"

The maxim, "Equity regards that as done which ought to be done," is elaborated in Secs. 363 and 364, Vol. 1, Pomeroy's Equity, and where it is said this maxim "has been applied by the most eminent courts to all classes of equities."

Query: Where does Congress get the power to sell, at public sale, the lands which do not belong to the United States, but which belong to the Omaha tribe of Indians?

The fact that the United States neglected to perform a ministerial duty; to-wit, to issue the patent in fee to the tribe, did not reinvest the title in the United States nor give the United States a right to sell the lands.

What title would a purchaser get who should buy the lands if so sold by the Secretary of the Interior?

The purchaser would be bound to take notice of the Act of 1882, and of the further fact that the Indians are in possession of the lands.

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THE PROVISO IN SEC. 8 OF THE ACT OF 1882, BY WHICH THE UNITED STATES BOUND ITSELF, AT THE EXPIRATION OF THE TRUST PERIOD, TO CONVEY THE RESERVATION BY PATENT TO SAID OMAHA TRIBE OF INDIANS IN FEE DISCHARGED OF SAID TRUST AND FREE OF ALL CHARGES OR INCUMBRANCES WHATSOEVER, WAS A CONTRACTUAL OBLIGATION BASED UPON AMPLE CONSIDERATION.

(a) By the Treaty of 1854 the Omaha Indians *ceded* to the United States a portion of the Reservation described in Article I.

By Article III, the Omahas relinquished to the United States all claims for money under former treaties.

By Article VI, individual Indians were to receive allotments of lands.

(b) In Article I of the treaty of 1865, the Omaha Tribe of Indians *"cede, sell, and convey to the United States"* a part of their Reservation therein described.

By Article II it is provided, *"in consideration of the foregoing session the United States agree to pay to the Omaha Tribe of Indians"* the sum of $50,000.

It is provided in Article III, *"In further consideration* of the foregoing session, the United States *agree to extend the provisions of Article VIII* of the Treaty of 1854, and agree to pay to the Omahas the sum of $7,000 as damages," etc.

By Article IV of said Treaty provision is made for allotments of the remainder of the Reservation; certificates to be issued therefor, to the effect that these lands "are for the exclusive use of themselves, their heirs, and descendants," etc.

(c) The Act of 1882 was based upon special considerations, in the particular that, "with the consent of Omaha Tribe of Indians, expressed in open council," the Secretary of the Interior was authorized to sell that part of the Reservation lying *west* of the right of way of

Sioux City and Nebraska Railroad Company (see Sec. 1); and that the residue of the lands lying *east* of the right of way of Sioux City and Nebraska Railroad Company, after all allotments had been made, *shall be patented to the said Omaha Tribe of Indians.*

It will thus be seen, as a consideration for obtaining this patent from the United States, that the Indians had given up and authorized the United States to sell and convey all that part of the Reservation lying west of the railroad. The Omaha Tribe of Indians gave formal approval and consent to the Act of 1882 (see report of Wilkinson, Indian Agent, and John Pilcher, Interpreter, rec. p. 10).

(d) According to the language of the Act of 1882, the obligation resting upon the United States to convey the Reservation to the Tribe by patent in fee *was mandatory.*

In neither of the Treaties or Acts of Congress is there any provision for reversion to the United States under any circumstances whatsoever.

VIII.

THE EVIDENCE IN THE RECORD TO THE EFFECT THAT CERTAIN INDIANS PETITIONED THAT THE REMAINING LANDS BE SOLD, AND THE PROCEEDS DIVIDED AMONG MEMBERS OF THE TRIBE, IS IRRELEVANT AND IMMATERIAL. THEY REPRESENTED BUT A SMALL MINORITY OF THE TRIBE, AND THE EVIDENCE SUGGESTS THAT SAID ACTION WAS THE RESULT OF A PROPAGANDA BY REAL ESTATE SPECULATORS.

Caryl E. Farley, who was the chief instigator of this propaganda, has a real estate office in Sioux City, Iowa, with a branch office at Walthill (rec. p. 78, fol. 94; rec. p. 81, fol. 97). This was the person who headed and circulated a petition for sale of the lands (rec. p. 71).

Walter C. Diddock, one of the persons who signed the petition, testified that he was in the real estate business (rec. p. 82, fol. 99); and further testified: "I am an Englishman, although born in the United States, and am not an Indian."

Edward Farley, another of the propagandists, testified (rec. p. 84, fol. 101): "I am an Irishman, not an Englishman."

Nebraska Hallowell, a member of the council of the tribe, who was present at the meeting of January 24, 1912, testified that the council was composed of twelve members, and that six out of the twelve—John Springer, Simeon Hallowell, Nebraska Hallowell, Amos Walker, Hiram Chase, and Cyrus Blackbird *were opposed to the sale of the lands.*

Hiram Chase, who was president of Omaha Tribe of Indians, wrote a letter to the President of the United States, under date of February 11, 1909 (rec. p. 91), in which letter *Mr. Chase* states (rec. p. 92, fol. 101), that the proposal to sell the Reservation is "in every respect but a hidden and *fraudulent* scheme of John M. Commons, the Indian Agent, *backed by a gang of grafters and speculators* who surrounded him, and practically run our tribal affairs." * * *

> "Mr. President, the proposed scheme to sell our tribe' lands and divest the 150 children of our tribe of their rights to be allotted these lands *was never the dream of our tribe.* And it is in violation of our constitution and system of deliberating and settling all of our tribal affairs, that John M. Commons under color of his authority, as Indian Agent, *backed by grafters* and *speculators* that called several meetings in which his schemes were defeated in every instance by the tribe." * * *
>
> "And it is absolutely untrue and false that the scheme in question 'meets the wishes of a majority of the tribe, as expressed in open council, as reported by the newspapers."

(a) The petitions introduced in evidence were not a justification for the Act of Congress, for they did not represent a majority of the tribe.

(b) The petition of certain Indians (rec. pp. 67, 68), dated 1909, was three years before the Act of Congress, and only had ninety-five names thereon out of twelve hundred members of the tribe (rec. p. 91). The petition of February 26, 1912, has only forty-six names thereon (rec. p. 74). Manifestly, the petition of 1909 was wholly disconnected from the petition of 1912.

(c) It appears (rec. p. 85), and from Exhibit "37" (rec. p. 85), that the names of four persons on said petitions were not members of the Omaha Tribe of Indians. It appears from Exhibit "38" that fourteen persons whose names appear upon the petition were women (rec. p. 8'). It appears by Exhibit "36" that on said petitions there are twenty-nine names which are duplicated, or otherwise appear twice (rec. p. 85).

If the petitions of Indians dated 1909 and 1912 are taken together, the aggregate is only one hundred forty-one names, out of a total of twelve hundred members of the tribe. From these one hundred forty-one names there should be deducted the twenty-nine names which are duplicated.

There should be deducted the four names not members of the tribe.

There should also be deducted the fourteen names of women.

These total deductions would leave only ninety-four names.

(d) By Exhibit "40" (rec. pp. 86 to 89, and rec. p. 90) it appears there were three hundred and one male members of the tribe over twenty-one years of age, in January, 1912, so that, taking the most favorable view of

the case in favor of the United States, less than one-third of the male members of the tribe over twenty-one years of age were in favor of the sale of the unallotted lands.

(e) It appears from the Government's Exhibit "33" (rec. p. 69) that there were less than fifty votes at the tribal meeting in favor of sending delegates to Washington to advocate selling of the lands.

The evidence is undisputed that the total membership of the tribe at that time was about twelve hundred fifty (rec. p. 94), and the male members over twenty-one years of age, three hundred one.

It thus appears conclusively that there was only a small minority of the tribe asking to have the lands sold, and that any affirmative action was not an expression of the willingness or desire of the tribe.

CONCLUSION.

By the terms of the Act of 1882, Omaha Tribe of Indians became vested with full title to these lands at the expiration of the trust period, July 10, 1909. The *Circuit Judges, Sanborn, Adams* and *Carland,* were right when they said in *Chase v. United States,* 238 Fed. 887:

> "*The failure to issue the patent in fee was an unimportant omission of a ministerial duty only, and that the rights of the members of the Tribe therein are not affected by this omission.*"

The Secretary of the Interior was right when he said in his report, February 28, 1913 (rec. p. 52):

> "There can be no doubt that children born since March 3, 1893, *have been born into a right to an allotment of forty acres under the provision of the Act of August 7, 1882.*"

The *Circuit Judges, Sanborn, Adams* and *Carland,* were right when they likewise held in their opinion in *Chase v.*

United States, 238 Fed. 887, that the language of the Act of 1882 is "comprehensive and *imperative.*" "It *commands* that allotments shall be made to every child of the Tribe who may be born within the specified period of twenty-five years, ending in 1909."

HIRAM CHASE,
Of Counsel.

JOHN LEE WEBSTER,
Solicitor for Appellants.

APPENDIX.

TREATY WITH THE OMAHA, 1854.

March 16, 1854, 10 Stat. 1043.

Article I. The Omaha Indians *cede* to the United States *all their lands west of the Missouri River, and south of a line* drawn due west from a point in the centre of the main channel of the said Missouri river due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever *relinquish all right* and *title* to the country south of said line; *Provided,* however, that if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in counsel express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, *they to receive the same rate per acre* for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

Article II. The Omahas agree, that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by

them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be.

Article III. The *Omahas relinquish* to the United States *all claims for money* or other thing, under former treaties and likewise all claim which they may have heretofore, at any time set up, to any land on the east side of the Missouri River; *Provided,* The Omahas shall still be entitled to and receive from the Government the *unpaid balance of the twenty-five thousand dollars* appropriated for their use by the act of thirtieth of August, 1851.

Article VI. The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be *surveyed into lots, and to assign to such Indian or Indians of said tribe as* are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person *over twenty-one years of age, one-eighth* of a section; to *each family* of *two one-quarter section;* to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, *issue a patent to such person or family* for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force, until a State constitution embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, can-

cel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

The sections omitted are immaterial to this case.

TREATY WITH THE OMAHA, MARCH 6, 1865.

14 Stats. 667.

Article I. The Omaha tribe of Indians do hereby *cede, sell* and *convey to the United States* a tract of land from the north side of their present reservation, defined and bounded as follows, viz.: Commencing at a point on the Missouri River four miles due south from the north boundary line of said reservation, thence west ten miles, thence south four miles, thence west to the western boundary line of the reservation, thence north to the northern boundary line, thence east to the Missouri River and thence south along the river to the place of beginning; and that the said Omaha tribe of Indians will vacate and give possession of the lands ceded by this treaty immediately after its ratification; Provided, That nothing herein contained shall be construed to include any of the lands upon which the said Omaha tribe of Indians have now improvements, or any land or improvements belonging to, connected with, or used for the benefit of the Missouri school, now in existence upon the Omaha reservation.

Article II. In *consideration* of the foregoing cession, the *United States agree to pay to the said Omaha tribe*

of Indians the sum of fifty thousand dollars to be paid upon ratification of this treaty, and to be expended by their agent, under the direction of the Commissioner of Indian Affairs, for goods, provisions, cattle, horses, construction of buildings, farming implements, breaking up lands, and other improvements on their reservation.

Article III. In *further consideration* of the foregoing cession, the United States *agree to extend the provisions of article VIII of the treaty between the Omaha tribe of Indians and the United States, made on the 16th day of March, A. D. 1854,* for a term of *ten years* from and after the ratification of this treaty; and the *United States* further *agree to pay* to the said Omaha tribe of Indians, upon the ratification of this treaty, the *sum of seven thousand dollars as damages* in consequence of the occupancy of a portion of the Omaha reservation not hereby ceded, and use and destruction of timber by the Winnebago tribe of Indians while temporarily residing thereon.

Article IV. The Omaha Indians being *desirous of promoting settled habits of industry* and enterprise amongst themselves by *abolishing the tenure in common by which they now hold their lands,* and by assigning limited quantities thereof in severalty to the members of the tribe, including their half or mixed blood relatives now residing with them to be cultivated and improved for their own individual use and benefit, it is hereby agreed and *stipulated* that the *remaining portion* of their present reservation shall be set apart for said purposes; and that out of the same there *shall be assigned to each head of a family* not exceeding one hundred and sixty acres, and *to each male person,* eighteen years of age and upwards, without family, not exceeding forty acres of land—to include in every case, as far as practicable, a reasonable proportion of timber; six hundred and forty acres of said lands, embracing and surrounding the present agency improvements, shall also be set apart and appropriated to the occupancy and use of the agency for said Indians. The *lands to be so assigned,* including those for the use of the agency, shall be in as regular and compact a body as possible, and so as to admit of a distinct and well-defined exterior boundary. The whole of the lands, assigned or unassigned, in severalty,

shall constitute and be known as the *Omaha reservation*, within and over which all laws passed or which may be passed by Congress, regulating trade and intercourse with the Indian tribes shall have full force and effect, and no white person, except such as shall be in the employ of the United States shall be allowed to reside or go upon any portion of said reservation without the written permission of the superintendent of Indian Affairs or the agent for the tribe. Said division and assignment of lands to the Omahas in severalty shall be made under the direction of the Secretary of the Interior, and when approved by him shall be final and conclusive. Certificates shall be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of individuals to whom they have been assigned respectively, *and that they are for the exclusive use and benefit of themselves, their heirs, and descendants;* and said tracts shall not be alienated in fee, leased, or otherwise disposed of except to the United States or to other members of the tribe, under such rules and regulations as may be prescribed by the Secretary of the Interior, and they shall be exempt from taxation, levy, sale, or forfeiture, until otherwise provided for by Congress.

ACT OF AUGUST 7, 1882.

22 Stat. 341.

Chap. 434.—An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the *consent* of the Omaha tribe of Indians, *expressed in open council,* the Secretary of the Interior be, and he hereby is, authorized to cause to be surveyed, if necessary, and sold, all that portion of their reservation in the State of Nebraska lying *west* of the right of way granted by said Indians to the Sioux City and Nebraska Railroad Company under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior, July twenty-seventh, eighteen hundred and eighty."

Section 4. That when purchasers of said lands shall have complied with the provisions of this act as to payment, improvements and so forth, proof thereof shall be received by the local land office at Neligh, Nebraska, and patents shall be issued as in the case of public lands offered for settlement under the homestead and preemption acts; Provided, that any right in severalty acquired by any Indian under existing treaties shall not be affected by this act.

Section 5. That with the *consent of said Indians* as aforesaid the Secretary of the Interior be, and he is hereby authorized, either through the agent of said tribe or such other person as he may designate, *to allot* the lands lying east of the right of way granted to the Sioux City and Nebraska Railroad Company, under the agreement of April nineteenth, eighteen hundred and eighty, approved by the Acting Secretary of the Interior July twenty-seventh, eighteen hundred and eighty, in severalty to the Indians of said tribe in quantity as follows: To *each head of a family*, one-quarter of a section; to *each single person* over eighteen years of age, one-eighth of a section; to *each orphan child* under eighteen years of age, one-eighth of a section; and to *each other person* under eighteen years of age, one-sixteenth of a section; which allotments shall be deemed and held to be in lieu of the allotments or assignments provided for in the fourth article of the treaty with the Omahas, concluded March sixth, eighteen hundred and sixty-five, and for which, for the most part, certificates in the names of individual Indians to whom tracts have been assigned, have been issued by the Commissioner of Indian Affairs, as in said article provided; Provided, That any Indian to whom a tract of land has been assigned and certificate issued, or who was entitled to receive the same, under the provisions of said fourth article, and who has made valuable improvements thereon, and any Indian who being entitled to an assignment and certificate under said article, has settled and made valuable improvements upon a tract assigned to any Indian who has never occupied or improved such tract, shall have a preference right to select the tract upon which his improvements are situated, for allotment under the provisions of this section; Provided further,

That all allotments made under the provisions of this section shall be selected by the Indians, heads of families selecting for the minor children, and the agent shall select for each orphan child; after which the certificates issued by the Commissioner of Indian Affairs as aforesaid shall be deemed and held to be null and void.

Section 6. That *upon the approval of the allotments* provided for in the preceding section by the Secretary of the Interior, he shall cause *patents to issue therefor* in the name of the allotees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, *and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever.* And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void; Provided, That the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered.

Section 7. That upon the completion of said allotments and the patenting of the lands to said allotees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said tribe the equal protection of the law.

Section 8. That the *residue of lands* lying east of the said right of way of the Sioux City and Nebraska Railroad Company, *after all allotments have been made,* as in the fifth section of this act provided *shall be patented to the said Omaha tribe of Indians, which patent shall be of the legal effect and declare that the United States* does and will hold the land thus patented for the period of twenty-five years in trust for the sole use and benefit

of the said Omaha tribe of Indians, *and that at the expiration of said period the United States will convey the same by patent to said Omaha tribe of Indians, in fee discharged of said trust and free of all charge or encumbrance whatsoever; Provided,* That *from the residue of lands thus patented to the tribe in common, allotments shall be made* and patented to each Omaha child who may be *born prior to the expiration of the time* during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common; And *provided further, That these patents* when issued, *shall override the patent authorized to be issued to the tribe* as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe; Provided, That said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act.

The Sections omitted have no bearing upon any questions involved in this lawsuit.

ACT OF MARCH 3, 1893.

27 Stat. 612, 630.

That the Act of Congress approved August seventh, eighteen hundred and eighty-two, entitled "An act to provide for the sale of a part of the reservation of the *Omaha tribe of Indians in the State of Nebraska,* and for other purposes," be and the same *is hereby amended* so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to *allot in severalty* through an allotting agent of the Interior Department, *to each Indian woman and child of said tribe born since allotments of land were made in severalty* to the mem-

bers thereof under the provisions of said act and now living, *one-eighth of a section* of the residue lands held by that tribe in common, *instead of one-sixteenth* of a section, as therein provided and to allot in severalty to *each allottee under said act now living*, who received only one-sixteenth of a section thereunder, *an additional one-sixteenth of a section* of such residue lands; Provided, That the allotments so made shall be subject to the same conditions, restrictions, and limitations, provided for in sections six, seven, and eight of said act, touching allotments and patents to allottees therein mentioned; And provided, That the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations.

ACT OF MAY 11, 1912.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior be, and he is hereby, *authorized* to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian reservation, in the state of Nebraska, except such tracts as are hereinafter specifically reserved; Provided, that the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof; And provided further, that prior to such appraisement and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri river shall be permitted to relinquish such allotment and select lieu lands of equal area from the unalloted lands, the lands so relinquished to become a part of the unallotted tribal lands and subject to appraisement and sale under the terms of this act.

"*Sec. 2.* That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this act, the following tracts of land for the purposes designated: Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; two acres of land on which is standing what is known as the old Presbyterian mission building and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska. Provided, that of the land now reserved for agency purposes the Secretary of the Interior is directed to reserve and set aside for town-site purposes one hundred and sixty-four acres other than the forty-nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this act, and the streets, alleys, and parks are hereby dedicated to public use. Provided further, that the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

"*Sec. 3.* That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro rata among the children of the Omaha Tribe living on the date of the passage and approval of this act who have not received allotments of lands under the acts of August seventh, eighteen hundred and eighty-two (twenty-second United States Statutes at Large, page three hundred and forty-one) and March third, eighteen hundred and ninety-

three (twenty-third United States Statutes at Large, page six hundred and thirty), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of any such Indian while there remains in the treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the state of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

"*Sec. 4.* That for the purpose of carrying out the provisions of this act there is hereby appropriated, out of any money in the treasury not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands."

MAR 19 1921
JAMES D. MAHER,
CLERK

In the Supreme Court of the United States.

HIRAM CHASE, JR., A MINOR,
BY HIS NEXT FRIEND,
HIRAM CHASE, SR.,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
242

MARY GILPIN, A MINOR, BY
HER NEXT FRIEND,
SAMUEL GILPIN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
243

APPEAL FROM UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF APPELLANTS.

HIRAM CHASE,
Of Counsel.

JOHN LEE WEBSTER,
Solicitor for Appellants.

GIBSON BROS., INC., PRINTERS, WASHINGTON.

In the Supreme Court of the United States.

HIRAM CHASE, JR., A MINOR,
BY HIS NEXT FRIEND,
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Appellant,
VS.
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MARY GILPIN, A MINOR, BY
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243

APPEAL FROM UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF OF APPELLANTS.

SEC. I.

THE ACT OF MAY 11, 1912, AS AN ACT TO EXTINGUISH THE RIGHTS OF THE OMAHA TRIBE AND ITS MEMBERS TO THEIR LANDS AS FIXED BY THE TREATIES OF 1854 AND 1865 AND THE ACT OF 1882, IS INVALID BY FORCE OF SEC. 2116 OF THE REVISED STATUTES.

The Act of May 11, 1912 having for its object the *extinguishment* of the rights of the Omaha tribe and its members to their lands as provided by the 8th Section of the Act of 1882, is invalid on the following grounds:

> The Act of 1912 does not repeal by implication or otherwise, Section 2116 of the Revised Statutes *supra* which provides the *only* mode for the extinguishment of Indian rights to their lands, viz: by treaty or *convention*—implying their *consent in open council.*

The Act of 1882 under which appellants claim their right to an allotment, is valid because it was with the *consent of the Omaha tribe of Indians expressed in open council.* (Sec. 1 and 5; 22 St. at Large 341.)

The Act of 1912 having for its object the extinguishment of tribal lands subject to a right of allotment in severalty in favor of appellants *is void, for want of consent thereto by the Omaha tribe of Indians in open council, in conformity to Section 2116 Revised Statutes.*

Section 2116, prohibits the extinguishment of the right of Indians to their lands of every kind, except by *treaty* or *convention* under the Constitution—implying that this shall be done by consent of the tribe as a tribe in open council as was done under the Act of 1882.

For the reason that the Act of 1912 *has not had the proper consent* of the Omaha tribe of Indians, as provided by Sec. 2116 of the Revised Statutes, the rights of appellants to their allotments under the Act of 1882 has become absolute by reason of their *selections.*

As recent as April 6, 1914, this court referring to this Section 2116 (misquoted as 2118) of the Revised Statutes decided, that the right of members of an Indian tribe to an allotment of land *could not be taken away or divested, except in the mode prescribed by law creating such rights.* (Franklin v. Lynch; 233 U. S. 269; 58 L. Ed. 955.)

On this point the court said:

> "The Revised Statutes (§ 2118) (evidently meaning Section 2116 *supra*) declare that no conveyance from an Indian tribe shall be of any validity in law or equity unless authorized by treaty. As the tribe could not sell, neither could the individual members for they had neither an undivided interest in the tribal land, no vendible interest in any particular tract. (Gritts *v.* Fisher 224 U. S. 641; 56 L. Ed. 931; 32 Sup. Ct. Rep. 580). But in pursuance of the legislation following the report of the Dawes Commission (Choate *v.* Trapp 224 U. S. 665, 56 L. Ed. 941; 32 Sup. Ct. Rep. 565) provision was made for dividing and distributing the tribal land in severalty among the members of the tribe. But recognizing the probability of improvident and hasty sales being made, Congress provided that the land could not be sold until after the patent had actually issued, and even then only one quarter could be sold in one year, three quarters in three years, and the balance in five years.
>
> The Act of 1904 relied on by plaintiff removed some of the restrictions, and permitted those members of the tribe who were not of Indian blood to sell land after it had been actually allotted in severalty. But it did not permit even a non-Indian to sell a mere float or expectancy, since he would not likely receive the full value of what thereafter might be patented to him. (Franklin *v.* Lynch 233 U. S. 269; 58 L. Ed. 955.)

In a recent case this court decided:

> That the right of Indian children to allotments of land out of tribal lands as fixed by previous statutes could not be divested by subsequent legislation. (Gritts *v.* Fisher 224 U. S. 641; 56 L. Ed. 931; 32 Sup. Ct. Rep. 580.)

Selections of land by Indians for allotments under treaties and statutes are considered as vested rights enforceable in a court of justice. (Sec. 24 Subdv. 24, Fed. Stts. Ann. 2 ed. p. 1062, C. C. 1904: 132 Fed. 889.)

Such rights cannot be divested by force of the 5th Amendment to the United States Constitution; (Choate *v.* Trapp; 224 U. S. 665.)

Sec. II.

THE ACT OF MAR. 3, 1893, FOR AN ADDITIONAL FORTY ACRE ALLOTMENT OF TRIBAL LANDS OF OMAHA TRIBE, FOR EACH OMAHA CHILD BORN (ALIVE) WITHIN THE TWENTY-FIVE YEARS FIXED BY SEC. 8, ACT OF 1882, DID NOT OPERATE TO EXCLUDE CHIDLREN BORN AFTER MAR. 3, 1893.

One of the contentions of the appellees, is that the Act of 1893 as an amendment to Section 8, of the Act of 1882 *cuts off the right of allotment to children born* after the date of the Act of March 3, 1893.

The trouble with this contention is that it violates elementary principles of law, in the construction of *several statutes* on one subject and *in pari materia,* and these principles are:

> That in the construction of several acts on a given subject *in pari materia* they must be harmonized and read together as *one act* and all parts be given *force and effect as one Act.*

In construing the Acts of 1882 and 1893, as one Act, the following facts must be taken into consideration:

> 1. The fact that the *right* to an allotment of land for each Omaha child to be born within twenty-five years as fixed by the 8th Section of the Act of 1882, *remained unexecuted* between July 11, 1884, up to and until after March 3, 1893. (See Record p. 30-31.)
>
> 2. That it is a matter of *judicial notice* of the *course of nature* that all human beings are born to die, and that many *deaths* must have occurred among the Omaha Indian children born between the dates of July 11th, 1884 and March 3, 1893. (Record p. 29-30.)

Under these circumsatnces it is contended by appellants, that the expression *"now living"* as used in the Act of March 3, 1893, is *not destructive* of the *right* of allotment of *80* acres of land in favor of Omaha children born after March 3, 1893.

> The expression "now living" as used in said Act of 1893 was no doubt providently used by Congress to obviate any notion of allotting lands to *dead children;* this is in accordance with reason and course of nature, for an allotment cannot be made to a dead person, neither can his heirs be allotted; (*La Rogue* v.*U. S.;* 36 S. Ct. 22, 239 U. S. 62; 60 L. ed. 147.)

The *intention* of the Act of 1893, to exclude the idea of allotting to children who had died prior to March 3, 1893 was recognized by the Indian Office.

The Indian Commissioner's letter of instructions to the Allotting Agent on this point reads as follows:

> "You will observe that no person, who died before March 3d, 1893 is entitled to an allotment. * * *" (Record 242, p. 31.)

This court in a recent case (Gritts v. Fisher, 224 U. S. 641, 56 L. ed. 931; 32 S. Ct. 580 decided:

> That a *subsequent Act of Congress did not* have the effect to exclude children born after a certain date, to participate in allotments of tribal land as had been fixed by *previous legislation.*

In this Gritts v. *Fisher case supra,* a bill in equity was filed in the Supreme Court of the District of Columbia, to enforce the provisions of an Act of 1906, excluding Indian children born after Sept. 1st, 1902, from their allotments of lands out of tribal lands as fixed by a *previous* Act of 1902. On demurrer the cause was dismissed, which decision was affirmed by the Court of Appeals, which decision of the last named court was affirmed by this Supreme Court.

In affirming the decisions of the lower courts this court said:

> It is not to be overlooked that those for whose benefit the change was made in 1906, were not strangers to the tribe, but were children born into it while it was still in existence and while there was still tribal property whereby they could be put on an equal or approximately equal plane with other members. The Council of the tribe asked that this be done and we entertain no doubt that Congress in acceding to the request was well within its power. Decree affirmed. (Gritts *v.* Fisher 224 U. S. 641; 56 L. ed. 931; 32 S. Ct. 580.)

Wherefore: for the reasons:

> That the *selections* of 80 acres for each of appellants have become *vested rights of property* under the Acts of 1882 and 1893, and
>
> That said *vested rights* are under the protection of the 5th Amendment to the U. S. Constitution and
>
> That said rights are not divested by the Act of 1912,

the judgment of this court should go to correct all errors in the courts below and for the enforcement of the rights of appellants.

JOHN LEE WEBSTER,
Solicitor for Appellants.

HIRAM CHASE,
Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

HIRAM CHASE, JR., *a minor, by his next friend,* HIRAM CHASE, *Appellant,*
v.
THE UNITED STATES OF AMERICA. } No. 242.

MARY GILPIN, *a minor, by her next friend,* SAMUEL GILPIN, *Appellant,*
v.
THE UNITED STATES OF AMERICA. } No. 243.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appeals in these cases are from decrees of the Circuit Court of Appeals for the Eighth Circuit which affirmed decrees entered by the United States District Court for the District of Nebraska dismissing in each case the bill brought against the United States to establish the right of the plaintiff, a minor child of the Omaha Tribe of Indians, to an allotment of land within the Omaha Reservation.

The issues in the two cases are identical, and the ruling in one would govern and control the other. They, with other similar cases, were consolidated and tried at the same time. The evidence taken is applicable to all, and is set forth in the record in the *Chase* case, No. 242, at page 23 *et seq.*

These suits were brought under the Act of August 15, 1894, c. 290, 28 Stat. 286, 305, § 1, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760 (U. S. Comp. Stat. Ann. 1916, § 4214). This statute gave the right to all persons of Indian blood or descent who had been denied allotments to test their claims and determine their rights with respect thereto in the proper United States courts which were given jurisdiction of such suits and whose decrees when in favor of the claimants were made binding upon the Secretary of the Interior.

From the record in the *Chase* case (No. 242) it appears that a bill to establish his right to a certain tract of land was filed May 19, 1910. R. 1, 2. To this, a demurrer was interposed (R. 3) and sustained (R. 6), whereupon an amended complaint was filed September 28, 1912. R. 7–15.

In support of the asserted right to an allotment, the amended bill of complaint set forth the following facts:

By a treaty made March 16, 1854, 10 Stat. 1043 between the United States and the Omahas, the latter relinquished all claim to land east of the Mis souri River and ceded to the Government all their lands west of that river and south of it; the lands

north of the river were to be reserved as a home for the tribe. Articles 1 and 3. The President of the United States was to have the reserved land surveyed and allotted in specified quantities to members of the tribe desiring permanent homes. Patents with certain restrictions were to issue, and there was a further provision that the residue of the lands not allotted might be sold for the benefit of the tribe. Article 6.

On March 6, 1865, a further treaty was concluded with the Omahas (14 Stat. 667), Article IV of which declared the desire of the Indians to abolish the tenure in common under which they held their lands and to have limited quantities thereof assigned in severalty to the members. It was therefore agreed that out of the remaining portion of their reservation there be assigned to each head of a family not to exceed one hundred and sixty acres, and to each male person eighteen years of age and over, without family, not exceeding forty acres; the division and assignment of the lands to be under the direction of the Secretary of the Interior, and when approved by him, to be final and conclusive. Certificates therefor were to be issued in the names of those to whom the tracts were assigned.

The Act of August 7, 1882, c. 434, 22 Stat. 341, provided for the opening and sale of that part of the lands of the Omaha Reservation *west* of the right of way of the Sioux City and Nebraska Railroad Company, and by §5 (p. 342) the Secretary of the Interior was authorized, with the consent of the Omahas, to allot

the reservation lands *east* of that right of way, in severalty to the Indians of the tribe, thus: to each head of a family, one quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years, one-eighth of a section; to each other person under eighteen years, one-sixteenth of a section. These allotments were to be held in lieu of those made under Article IV of the 1865 treaty, and when made the certificates theretofore issued under the 1865 treaty were to be null and void. Twenty-five year trust patents were to be issued. §6. Section 8 directed that after the allotments provided for in §5 had been made the remaining lands should be patented to the tribe under a twenty-five year trust patent. There was a further provision that from these residue lands patented to the tribe in common, allotments should be made to each Omaha child born during the trust period; these allotments to be in the same quantity and the patents under the same conditions and restrictions as specified for the other allotments, but those restrictions were not to extend beyond the period expressed in the trust patent to be issued to the tribe in common.

In the Indian Appropriation Act of March 3, 1893, c. 209, 27 Stat. 612, at pages 630, 631, there was this provision:

> That the act of Congress approved August seventh, eighteen hundred and eighty-two, entitled "An act to provide for the sale of a part of the reservation of the Omaha tribe of

> Indians in the State of Nebraska, and for other purposes," be, and the same is hereby, amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act, and now living, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, now living, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands: *Provided*, That the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in sections six, seven, and eight of said act, touching allotments and patents to allottees therein mentioned: * * *.

The theory of the bill of complaint was that the Act of 1893, *supra*, did not repeal the Act of 1882, and that under the latter each and every child born into the tribe after the date thereof was entitled to an allotment out of the residue lands which were to have been, but which for some unexplained reason were not, patented to the tribe in common under § 8 of the 1882 Act. Par. XIII, bill of complaint, R. 12. And further, that the purpose of the 1893 Act was merely to amend the 1882 Act by increasing the amount of allotments to Indian women and

children, and to give an additional allotment of one-sixteenth of a section to all other persons who had received an allotment under the 1882 Act; that it was not the purpose of the 1893 Act to deprive any member of a right to an allotment, nor was it within the power of Congress to do so if such were indeed the purpose of the 1893 Act. Par. XV, bill of complaint, R. 13.

While the record does not disclose it, a motion to dismiss this amended bill in the *Chase* case was filed, and sustained by the District Court apparently upon the theory that the 1893 Act was a repeal of or substitute for the 1882 Act.

An appeal was prosecuted to the Circuit Court of Appeals which reversed the decree dismissing the bill, 238 Fed. 887, and held that the 1893 Act was amendatory only and did not repeal the 1882 Act, hence that the bill stated a cause of action, since plaintiff was not disqualified to receive an allotment although not born until after the passage of the Act of 1893.

The United States then filed answer to the bill (R. 15–18), admitting most of the essential averments of the bill, save those which asserted the vesting of right to an allotment by virtue of the laws and admitted facts.

As a specific defense, the provisions of the Act of May 11, 1912, c. 121, 37 Stat. 111, were pleaded, which Act, it was alleged, was passed upon the petition of the Omaha Tribe and of the Council of that tribe Answer, par. eighth, R. 16, 17.

Section 1 of that Act is as follows:

> That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisement, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved: *Provided*, That the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof: *And provided further*, That prior to such appraisement and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River shall be permitted to relinquish such allotment and select lieu lands of equal area from the unallotted lands, the lands so relinquished to become a part of the unallotted tribal lands and subject to appraisement and sale under the terms of this Act.

Section 2 provided for reservation from sale of certain specified tracts of land; and section 3 provided:

> That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this Act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for

> protecting the unallotted tribal lands from overflow, shall be divided pro-rata among the children of the Omaha Tribe living on the date of the passage and approval of this Act who have not received allotments of land under the Acts of August seventh, eighteen hundred and eighty-two (Twenty-second United States Statutes at Large, page three hundred and forty-one), and March third, eighteen hundred and ninety-three (Twenty-third United States Statutes at Large, page six hundred and thirty), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, * * *.

It was further averred that at the time the amended bill of complaint was filed there were no lands on the Omaha Reservation subject to allotment to the members of that tribe, nor were there then, and that the particular lands asked for as an allotment were not at the time of the filing of the bill, nor then, subject to allotment; that said lands were held in trust for the Omaha Tribe, collectively and individually, by the United States which is charged

with the duty of protecting the rights of the tribe and the members in the use and occupancy thereof, and in the rents and profits therefrom, and in the proceeds of the sale under the Act of May 11, 1912. Answer, pars. tenth and eleventh, R. 17.

It was also stated that the lands applied for as an allotment by the plaintiff Chase had been set aside on the request of the Omaha Tribe for school and cemetery purposes, and were then, and at the time of the filing of the amended bill, being used for such purposes.

The bill and answer in the *Gilpin* case (No. 243) are substantially the same as in the *Chase* case. The original bill in the *Gilpin* case was filed February 5, 1913 (R. 2–10), after the amended bill in the *Chase* case. A motion to dismiss was interposed, decision thereon was postponed until the Court of Appeals decided the *Chase* case and then it was overruled (R. 11), whereupon the United States filed answer. R. 11–14.

For the purposes of trial, these two cases were consolidated with other like cases. R. 18. After trial and hearing, a decree was entered dismissing the bills. R. 19, *Chase* case, No. 242; R. 15, 16, *Gilpin* case, No. 243.

Upon appeal, the Circuit Court of Appeals affirmed the decrees. R. 108, 109, *Chase* case, No. 242; R. 24, *Gilpin* case, No. 243. Opinion of the Court of Appeals, *Chase* case, R. 101–108, 261 Fed. 833; *Gilpin* case, R. 23, 261 Fed. 841.

The appeals of plaintiffs bring the cases to this court.

The errors assigned by appellants attack the decrees of the District Court and those of the Court of Appeals upon the grounds: (1) That the decision of the Court of Appeals on the first appeal is the law of the case; (2) that the United States is estopped from setting up as a defense the Act of May 11, 1912; and (3) that the Act of May 11, 1912, did not deprive these claimants of their right to allotments and the holding of the Court of Appeals that it operated as a repeal of the previous Acts was erroneous.

PROPOSITIONS.

In support of the decrees below, we submit the following propositions:

1. *The rule of "the law of the case" has no application here.*

2. *Congress had plenary power to enact the statute of May 11, 1912, providing for the sale of unallotted tribal lands, and that statute bars any right which appellants might assert to an allotment.*

ARGUMENT.

I.

The rule of "the law of the case" has no application here.

A considerable part of the brief of appellants is devoted to an argument that the United States is estopped from setting up the provisions of the Act of May 11, 1912, as a bar to these suits and that the courts below erred because they did not treat the

decision of the Court of Appeals on the first appeal as the law of the case and decline to consider the case upon any other theory.

To support that argument, appellants contend that, as the existence of the law of 1912 was then known, the United States should have raised the question of the applicability of that law when its motion to dismiss was filed; that said motion raised only the question whether the Act of 1882 was repealed by that of 1893, and since the Court of Appeals decided that question adversely to the Government and reversed the decree of the District Court against the appellants, the United States could not thereafter "shift its ground" and set up the Act of 1912.

It is also asserted that as the Court of Appeals, upon the appeal by Chase from the decree dismissing his bill, decided that he was entitled to allotment under the 1882 Act, notwithstanding the Act of 1893, *that* judgment was thereafter binding upon the courts as the law of the case and no decision contrary even upon other issues could be rendered.

Now, we do not propose to burden the court with an argument to meet the contention that, when the United States made the motion to dismiss and raised the question whether the bill set forth upon its face a cause of action, basing the motion upon the theory that the Act of 1893 repealed the 1882 Act, it thereby abandoned all other grounds of defense and could not thereafter urge other grounds.

The decree of the Court of Appeals sent the case back with instructions to permit the United States

to make answer to the amended bill, if it be so advised. Of what avail would such a privilege be if no new grounds of defense could be set up?

We do not think it will be seriously questioned that had the District Court overruled the motion to dismiss, the United States could have set up in answer any number of defenses other than that presented by the motion. Yet apparently because it was successful with respect to its motion and because a decree dismissing the bill was entered when Chase, Jr., declined to plead further, that privilege is lost to the Government. In other words, the United States lost by winning.

But when the *Chase* case first came before the Court of Appeals the sole question presented was whether the 1893 Act repealed the 1882 Act. The 1912 Act was not mentioned in the pleadings nor in the court's decision. It is true that the court held (238 Fed. 893) that Chase, Jr., was entitled to an allotment under the 1882 Act, notwithstanding the provisions of the 1893 Act, but that was based entirely upon a consideration of those two Acts.

The rule of "the law of the case" in brief is that a decision on a question is binding upon a subsequent appeal and can not be relitigated. Mr. Justice Holmes tersely defines it in *Messenger* v. *Anderson*, 225 U. S. 436, thus (p. 444):

> In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses

> the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.

But the rule cannot be invoked except on questions which have been actually considered and determined. Any question not decided, or any matter left open, can be adjudged. *In re Sanford Fork and Tool Co.*, 160 U. S. 247, 255, 256; *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319. A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551, 553, 554; *In re Potts*, 166 U. S. 263, 265, 266, 267.

In re Sanford Fork and Tool Co., supra, is similar to the cases at bar. In that case exceptions had been sustained to the answer of defendants, who declined to plead further, and thereupon a final decree was entered against them. An appeal was taken to this court, which decided that the sustaining of the exceptions was erroneous. The case was "reversed, and the cause remanded * * * for further proceedings" * * *. Upon the coming down of the mandate, defendants moved for judgment upon the pleadings. This was denied and plaintiffs were granted leave to amend their bill. A writ of mandamus was sought to compel the Circuit Court to grant defendants' motion. In denying the mandamus, this court said (pp. 255, 256):

> When a case has been once decided by this court on appeal, and remanded to the Circuit

> Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. * * * But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton*, 103 U. S. 764; *Mason* v. *Pewabic Co.*, 153 U. S. 361; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 5 U. S. App. 97.

And at pages 258, 259:

> Nor did this court undertake, either by its opinion or by its mandate, to preclude the plaintiffs from filing a replication. On the contrary, at the outset of the opinion, after observing that, in the manner in which the case was submitted for decision, the facts alleged in the bill and not denied in the answer, and the new facts alleged in the answer, must be assumed to be true, the question arising upon those admitted facts was stated to be "whether the decree in favor of the plaintiffs can be sustained;" and, while the opinion declared that, assuming those facts, the mortgage was valid, yet both the opinion and the mandate ordered no final judgment for the defendant, but only ordered the judgment for the plaintiff to be reversed, and the cause remanded to the Circuit Court for further proceedings not inconsistent with the opinion of this court.

> The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218; *Neale* v. *Neales*, 9 Wall. 1; *Hardin* v. *Boyd*, 113 U. S. 756.

A helpful discussion of this rule is contained in *Alerding* v. *Allison*, 170 Indiana, 252, and the distinction between it and the rule of former adjudication pointed out. At pages 258, 259, the court said:

> The doctrine of "the law of the case," as referring to the decision of the court in a particular case on a former appeal, is analogous to the doctrine of former adjudication, but much more limited in its application.
>
> Under the rule of former adjudication, when a cause has been finally determined by a competent tribunal, all questions of controversy arising in the case must be taken as at rest forever, not only the things that were actually adjudged, but every other matter which the parties might have litigated under the issues formed. *Fichli* v. *Fichli* (1825), 1 Blackf. *360; *Gutheil* v. *Goodrich* (1903), 160 Ind. 92, 95. The rule known as "the law of the case," while as conclusive as in former adjudication, as to all matters within its scope, cannot be invoked, except as to

such questions as have been actually considered and determined in the first appeal. In the application of this rule courts will take cognizance of such points only as affirmatively appear in the last to have been decided in the former appeal. The rule being one which tends to prevent the judicial consideration of a particular controversy, is not to be extended beyond the exigencies which demand its application. (Citing cases.) * * * In the case of *Davis* v. *Krug*, *supra*, it is said: "The rule of 'the law of the case' thus limited to points considered and decided on the first appeal, meets our full approval. But we cannot agree to the claim of appellee's counsel that 'the law of the case' precludes us from considering and deciding now, on the second appeal of this cause, any questions which might have been, but were not, considered and decided as the case was presented on the first appeal. Such claim seems to us unreasonable, although we are aware that it is supported by many respectable authorities, and even by the language used in some of the reported cases of this court." In the case of *Wine* v. *Woods*, *supra*, it is said on page 391: "Only points decided become the law of the case."

II.

Congress had plenary power to enact the statute of May 11, 1912, providing for the sale of unallotted tribal lands, and that statute bars any right which appellants might assert to an allotment.

The tracts out of which the allotments sought by the appellants must be taken are the residue lands which by §8 of the Act of 1882 were to be patented to

the Omaha Tribe in common. A patent therefor never issued, and while the tribe might have insisted upon its issuance, yet it waived that right by requesting the enactment of the legislation which was contained in the Act of May 11, 1912. R. 65–74.

The fact that appellants might come within the purview of the 1882 Act so far as qualification for allotment is concerned gave them no vested right thereto. Until allotments were actually made, the individual Indians acquired no such rights as prevented Congress from providing for other disposition of the property. The individual Indian had no title or enforceable right in the tribal property. The plenary power of Congress over the Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. *Gritts* v. *Fisher*, 224 U. S. 640, 647, 648; *Choate* v. *Trapp*, 224 U. S. 665, 670, 671; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307.

The case of *Sizemore* v. *Brady*, 235 U. S. 441, is in point on principle. There it was contended that the case was governed by the law relating to Creek Indians and the distribution of their tribal lands, in force when one entitled to an allotment died, and that subsequent legislation adopting a different rule of inheritance did not affect the lands but that the heirs and their rights were to be determined as of the law applicable when the ancestor died.

This court, in disposing of that contention, speaking through Mr. Justice Van Devanter, said (pp. 449, 450):

> On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without violating the due process of law clause of the Fifth Amendment to the Constitution. To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe or make any provision deemed

> more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement, but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate* v. *Trapp*, 224 U. S. 665, 671.
>
> In principle it was so held in *Grilts* v. *Fisher*, 224 U. S. 640.

Having, then, the power to change the method and plan for distribution of the tribal land, it is clear that the Act of May 11, 1912, operated to repeal the provisions in the 1882 and 1893 Acts for allotments in severalty to children born after the 1882 Act.

The 1912 Act was entirely inconsistent with the other Acts. It could not be administered without making it impossible to carry out the provisions of the 1882 Act. There could not be a sale of the lands under the 1912 Act *and* allotment of the same lands to individual Indians under the 1882 Act. As the Court of Appeals very pertinently put it (R. 104, 105; 261 Fed. 837):

> The Secretary of the Interior, of course, could not allot the unallotted lands under the act of 1882, and also sell them under the act of 1912; nor could he allot the unallotted lands and at the same time make the reservations which he is commanded to make by section 2 of the latter act. It is so plain that both acts cannot be carried out that it is unnecessary to discuss that question.

The situation confronting Congress when the legislation which culminated in the Act of May 11, 1912, was proposed, was the utter impossibility of giving allotments to all children who would be entitled thereto, in the quantities specified in the Acts of 1882 and 1893.

In a letter of the Secretary of the Interior, made a part of the report on the bill of the Senate Committee on Indian Affairs, it was said (R. 62):

> The only allotments made from the residue of lands after the allotments of 1884 were made under the terms of the act of March 3, 1893 (27 Stat. L. 612, 630), which was amendatory in that it gave larger areas to children allotted under the former act, and provided for allotments for all women and children in being on March 3, 1893. The later act, however, did not repeal the former, so that there can be no doubt but that the children born since March 3, 1893, have been born into a right to an allotment of 40 acres each under the provisions of the act of August 7, 1882, supra, so long as any is left of the tribal land.
>
> The difficulty in carrying out the intent of this act at this time arises from the fact that there are now living 520 children of the tribe, who, having been born since March 3, 1893, have received no allotments and there is only about 4,500 acres of unallotted land, so that only 112 allotments of 40 acres each could be made to the 112 eldest unallotted children, leaving 408 children for whom no provision would be made. The prospect of such a disposition has aroused intense opposition among

the parents of the 408 children who would thus receive nothing. Moreover, the unallotted land varies greatly in character and value, so that it was impossible equitably to divide it.

To pass a measure providing for the equal distribution of the tribal lands among all the living children would be open to serious objection, because this would give each child only about 8.6 acres, of unequal value—a quantity too small to be either cultivated or leased to advantage.

CONCLUSION.

The decree of the Circuit Court of Appeals was correct and should be affirmed.

Respectfully submitted.

LESLIE C. GARNETT,
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MARCH, 1921.

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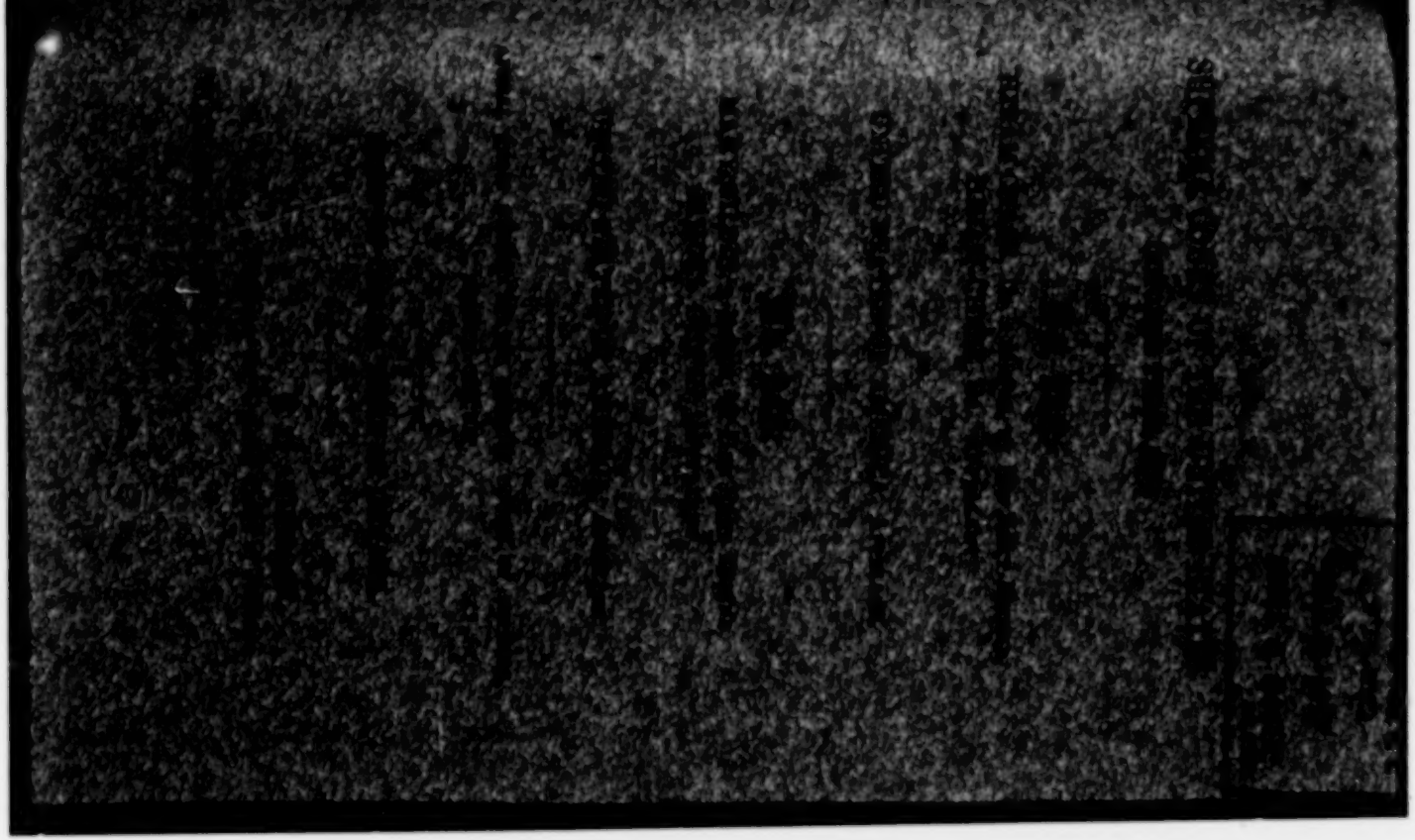

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 242.

HIRAM CHASE, JR., A MINOR, BY HIS NEXT FRIEND, HIRAM CHASE, SR., APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 243.

MARY GILPIN, A MINOR, BY HER NEXT FRIEND, SAMUEL GILPIN, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF APPELLEES.

Statement of the Case.

This brief on behalf of the Omaha Tribe of Indians is in answer to brief of appellants filed herein.

The Omaha Tribe of Indians desire to have all their unallotted lands sold and purchase-money distributed as pro-

vided by the act of Congress of May 11, 1912 (37 Stat., 111).

Plaintiffs in all these cases are members of the Omaha Tribe of Indians and bring these suits against the United States for allotments which they claim they are entitled to under and by virtue of the act of Congress of August 15, 1894 (28 Stat., 305), and the amendatory act thereto of February 6, 1901 (31 Stat., 760).

All lands involved in these suits are unallotted lands of the Omaha Tribe of Indians and part of the Omaha Indian reservation in the State of Nebraska.

Plaintiffs in all these suits were born subsequent to the passage by Congress of the act of March 3, 1893 (27 Stat., 630).

The two suits herein are identical with eighty-three other suits now pending in the Omaha division of the district court of Nebraska, the determination of which by agreement will be controlled by these two cases so far as the law is applicable thereto.

The present case of Hiram Chase, Jr., was originally submitted to the District Court, Omaha Division, for the District of Nebraska, on a general demurrer by appellee to the amended petition of the appellant, which demurrer was sustained by said district court. From that decree an appeal was sued out to the United States Circuit Court of Appeals for the Eighth Circuit, which court, on December 12, 1916, reversed the decree of said district court and remanded case to said district court with instructions to permit the defendants to answer, if so advised, which case is reported in 238 Fed., 887.

When the district court ruled on the demurrer in the Hiram Chase, Jr., case, there was then pending in said dis-

trict court twenty-two of the aforesaid eighty-three cases. All the remaining sixty-two cases, the application for allotments, and the bills of complaint were all made and filed by appellants in the district court for Nebraska after the decision of the circuit court of appeals in said Hiram Chase, Jr., case.

In all of said cases the application for allotments and the bill of complaint were made and filed by appellants subsequent to the passage of the act of Congress of May 11, 1912 (37 Stat., 111).

Upon the coming down of the mandate from said circuit court of appeals in said Hiram Chase, Jr., case to the district court, the United States filed answers in said Hiram Chase, Jr., case and in all the other like cases then pending in said district court, and among other things pleaded the act of Congress of May 11, 1912 (37 Stat., 111), authorizing the Secretary of the Interior, under conditions therein named, to sell the unallotted tribal lands.

Under said answers so filed to all bills of complaint in said district court, proofs and testimonies were taken and said district court again entered judgment for the United States and against the plaintiffs in all of said suits, including appellants in the Hiram Chase, Jr., suit and the Mary Gilpin suit herein.

From these judgments an appeal in the two cases herein of Hiram Chase, Jr., and Mary Gilpin was sued out in the United States Circuit Court of Appeals for the Eighth Circuit, which court, on November 21, 1919, affirmed the decree of said district court rendered in all of said cases, which decision is reported in 261 Fed., 833.

The right to such allotments by appellants in all of these

cases is sought in a construction of two treaties entered into by the United States and the Omaha Tribe of Indians, that of March 16, 1854 (10 Stat., 1043), and that of March 6, 1865 (14 Stat., 667), and three acts of Congress, that of August 7, 1882 (22 Stat., 341), and acts amendatory thereof March 3, 1893 (27 Stat., 630), and May 11, 1912 (37 Stat., 111).

The aforesaid act of Congress of May 11, 1912, was not pleaded in the bills of complaint nor in the demurrer of the United States when Hiram Chase, Jr., case and the twenty-two other like cases were submitted to the United States Circuit Court of Appeals and said court's attention was not called to said act in the briefs of appellants nor in the briefs of the United States nor in the oral arguments by attorneys on behalf of appellants or the United States, and the said circuit court in rendering its decisions did not take said act into consideration, and its opinion rendered in said case makes no reference to it.

ARGUMENT.

I.

PLAINTIFFS IN THESE SUITS CANNOT PREDICATE ANY RIGHT UNDER THE TREATIES OF 1854 (10 Stat., 1043) AND MARCH 16, 1865 (14 Stat., 667).

The right of appellants starts and is based upon section eight (8) of the act of Congress of August 7, 1882 (22 Stat., 341). The treaties of 1854 and 1865 set forth in the bills of complaint herein are not applicable, and the arguments

of counsel relating to same are not applicable for the reason that this court has held that the treaties of 1854 and 1865 and the certificates issued thereon in pursuance to said treaties gave to the Indians possessory rights only, and Congress could enact any legislation it saw fit with reference to said lands.

United States *vs.* Chase, 245 U. S., 89.

II.

THE TITLE OF THE OMAHA TRIBE OF INDIANS AND THE INDIVIDUAL MEMBERS THEREOF IN THE UNALLOTTED LANDS MENTIONED IN SECTION 8 OF THE ACT OF CONGRESS OF AUGUST 7, 1882 (22 STAT., 341), WAS MERELY ONE OF OCCUPANCY AND POSSESSION.

Under the first half of section 8 of said act of Congress the United States agreed to issue a trust patent of allotment to the Omaha Tribe of Indians for the unallotted lands. If this provision of section 8 stood alone and was the only statement with reference to said unallotted lands in said act, then it might be argued with some force that such patent would be similar to the trust patent which was issued to the individual members of the tribe under said act, and that its legal effect would be the same as that to the individual members of the tribe, and the United States would hold the legal title in fee and yet the tribe would have an interest therein as distinguished from mere occupancy or possession. But we find a provision contained in the last half of section 8, which modifies and qualifies all that part of section 8 which precedes the proviso. This proviso reads:

> "That from the residue from said lands thus patented to the tribe in common, allotments shall be made and patented to every Omaha Indian child who may have been born prior to the expiration of the time during which it is provided that such lands shall be held in trust by the United States in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act touching allotments and patents to the allottees therein mentioned. * * * *And Provided Further*, That these patents when issued shall override the patents authorized to be issued to the tribe as aforesaid and shall separate the individual allotments from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe."

Under this proviso the title which the tribe received to the unallotted lands was entirely different from that which the individual received under his trust patent of allotment. Under the trust patent which the United States issued to the individual he obtained a title that could not be taken away from him by an act of Congress if he as a citizen had a vested right in the particular piece of land which he had selected and for which a trust patent had been issued to him. The United States held the legal title in trust for the individual Indian and the individual Indian had a vested interest in his particular tract which had been granted to him subject to the trust reserved therein by the United States. But with the unallotted lands to which the tribe was to receive a patent, the title to the tribe was to be held in common by the tribe. The act provided that any Indian born prior to the expiration of the trust, which would be twenty-five years from the date of the trust patent, and who had not received an allotment would be entitled to an allotment out of these

lands so patented to the tribe, and patents so issued to such Indians would override the patent issued to the tribe and would separate said allotment from the lands to the tribe. If a sufficient number of Indians had made application for allotments, all of said lands so patented to the tribe could have been taken from the tribe and allotted to the individual Indians and the tribe would have no lands at all remaining under said trust patent which was to have been issued to the tribe. If the tribe has a vested interest in the title to these unallotted lands, then other Indians could not take the lands away from the tribe by means of an allotment or in any other manner without the consent of the tribe.

If the different members of the tribe have a vested interest in these unallotted lands, then the complainants in these various suits would have no right to any part of the same, as they would have no right to dispossess any one of their vested interest in these lands. The only interest which the tribe held to these unallotted lands was that of the tribe and not as individuals, and the tribal title was merely a title of occupancy or possession, which was subject to allotment under the act of Congress of August 7, 1882, and subsequent act of March 3, 1893 (27 Stat., 630).

When the act of August 7, 1882, went into effect there was more than enough tribal land to allot all Omaha Indians the quantity of land mentioned in the act, and Congress recognized the fact that Indians would be born after the first allotments were made and some provision should be made for them out of the tribal lands not allotted, and made such provision in the last half of section 8 of said act. All that section 8 amounts to with reference to these unallotted lands is a plan or scheme by Congress for the tribe to hold posses-

sion or control of these unallotted lands until the same could be allotted to individual Indians who had no allotments. The language used in said act and the conditions set forth therein with reference to the unallotted lands are not such as would give the tribe any interest as a tribe in the fee title, but only an occupancy or possessory title in the tribe.

Lands granted to a tribe until allotted are entered under ordinary Indian claim, under which the Indian holds a mere right of possession and occupancy with fee title in the United States (Nadeau *vs.* Union Pacific Railroad Company, 40 S. Ct. Rep., 570).

The conditions and limitations prescribed in this act of 1882 with reference to these unallotted tribal lands show clearly same was not a grant *in præsenti.*

United States *vs.* Rowell (243 U. S., 464).

The Secretary of the Interior, the Commissioner of Indian Affairs, the Omaha Tribe of Indians, and the different members of said tribe have at all times in their dealings with reference to these unallotted tribal lands recognized the fact that the Secretary of the Interior had sole jurisdiction over these lands.

III.

"CONGRESS HAD AUTHORITY AT ANY TIME BEFORE THE TRUST PATENT WAS ISSUED TO THE OMAHA TRIBE OF INDIANS FOR THEIR TRIBAL LANDS MENTIONED IN SECTION 8 OF THE ACT OF 1882, OR EVEN AFTER THE SAME WAS ISSUED, TO MAKE OTHER AND DIFFERENT DISPOSITION OF SAID UNALLOTTED LANDS, WITH OR WITHOUT THE CONSENT OF THE OMAHA TRIBE OF INDIANS, WHICH IT SUBSEQUENTLY DID

UNDER AND BY VIRTUE OF THE ACTS OF CONGRESS OF MARCH 3, 1893 (27 STAT., 630), AND OF MAY 11, 1912 (37 STAT., 111)."

The lands in question are tribal lands and do not belong to the individual members of the tribe, and the legal title to said lands is in the United States with possessory title in the tribe. Whatever title the tribe may have in and to these tribal lands is that of a tribe and not as individuals, and the fee title is in the United States and would still be in the United States if the trust patent had been issued to the tribe. Whatever title the United States may have in said lands or whatever title the tribe may have in said lands, the United States has the power to make such disposition of such lands as it deems advisable and the courts have no jurisdiction over said matter.

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning of the Government down to the present time and the power has always been held to be a political one, not subject to be controlled by the Judicial Department of the Government. Until the year 1871 the policy pursued was that of dealing with the Indians by means of treaties and this method was followed from the beginning of our Government up to the year 1871 when Congress determined upon a new policy to govern the Indian tribes and Indian matters by act of Congress. This is seen in the act of March 3, 1871, embodied in Section 2079 of the Revised Statutes as follows:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom

> the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall hereby be invalidated or impaired."

Since the aforesaid act of 1871 the Indian Tribes have ceased to be treaty-making powers and have simply become wards of the nation. Brown *vs.* United States, 32 Ct. Cl., 432.

In the case of Lone Wolf *vs.* Hitchcock, 187 U. S., 553, is the following statement with reference to the power of Congress over the Indian tribal lands:

> "Plenary power over the tribal relations of the Indians has been exercised from the beginning and the power has always been a political one, not subject to be controlled by the Judicial Department of the Government. Until the year 1871, the policy pursued was that of dealing with the Indian tribes by means of treaties and of course a moral obligation rests upon Congress to act in good faith in performing these stipulations entered into on its behalf. But as with treaties with foreign nations, the legislative power may pass laws in conflict with treaties made with the Indians."

The court further states:

> "That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands are concerned, to be controlled by direct legislation of Congress."

In the case of Cherokee Nation *vs.* Hitchcock, 187 U. S., 294, this court said:

> "The power exists in Congress to administer upon and guard the tribal property and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine and is not one for the courts."

While the United States has no ownership in Indian lands in any of the thirteen original States, the tribal Indians who hold and occupy such lands, whether in common or in severalty by agreement among themselves, are its wards and it may maintain suits for the protection of their property and personal rights and institute such legislation with reference to the same as it may deem advisable.

United States *vs.* Boyland, 256 Fed. Report, 468.
Stephens *vs.* Cherokee Nation, 174 U. S., 445.

In dealing with tribal Indians in respect to their severalty lands, the United States has dual sources of authority. In the first place, it may as owner of the fee impose such conditions as it sees fit in its grant to the Indians. In the second place, it may as a guardian of a people in a state of pupilage impose such restrictions as seem advisable for the protection and welfare of such wards in the enjoyment of the ownership of the lands. The exercise of this latter authority in no way depends upon the former but may operate where the land has passed from all restrictions of the grant. Lone Wolf *vs.* Hitchcock, 187 U. S., 553; Bruder *vs.* James, 246 U. S., 588; Tiger *vs.* Western Insurance Company, 221 U. S., 286; La Motte *vs.* United States, 256 Fed. Report, 5.

The United States has complete legislative power over all lands held by the Indians as a tribe, and it can enact such

legislation as it deems advisable with reference to the same. Conley *vs.* Ballinger, 216 U. S., 884.

Lands of the Pueblo Indians in New Mexico held in communal fee-simple ownership by the Indians of each pueblo are subject to the legislation of Congress acting in the exercise of the Government's guardianship over such Indian communities and their affairs. United States *vs.* Sandoval, 231 U. S., 28.

Congress as guardian of the Indians has power to legislate in respect to lands held by an Indian Tribe under the ordinary Indian right of possession and occupancy with fee in the United States. Nadeau *vs.* U. Pacific Railway Company, 40 S. Ct. Rep., 570.

To the same effect and laying down the same principle of law see following cases:

Cooley Constitutional Law, 6 ed., page 117.
United States *vs.* Kagama, 118 U. S., 375.
Choctaw Nation *vs.* U. S., 119 U. S., 1.
Worcester *vs.* Georgia, 6 Pet.
Cherokee Nation *vs.* Georgia, 5 Pet., 1.
Cherokee Nation *vs.* Southern Kansas Ry. Co., 135 U. S., 641.
Conley *vs.* Ballinger, 216 U. S., 84.
Cherokee Trust Funds, 117 U. S., 288.
Cherokee Nation *vs.* Journey Cake, 155 U. S., 196, 207.
U. S. *vs.* Nice, 241 U. S., 519.
U. S. *vs.* Rowell, 243 U. S., 464.
Williams *vs.* Johnson, 239 U. S., 414.
U. S. *vs.* Chase, 245 U. S., 89.
Daugherty *vs.* McFarland, 166 N. W., 143.

U. S. *vs.* Des Moines Nav. & R. Co., 142 U. S., 510.
Gritts *vs.* Fisher, 224 U. S., 640.
Choate *vs.* Trapp, 224 U. S., 665.
Sizemore *vs.* Brady, 235 U. S., 441.
Johnson *vs.* McIntosh, 8 Wheat., 543.
Baker *vs.* Harvey, 181 U. S., 481.
McCulloch *vs.* Maryland, 4 Wheat., 316.
Elk *vs.* Williams, 112 U. S., 94.
Lowe *vs.* U. S., 242 U. S., 654.
Ex P. Crow Dog, 109 U. S., 556.
Head Money cases, 112 U. S., 580.
Whitney *vs.* Robertson, 124 U. S., 190.
Wallace *vs.* Adams, 204 U. S., 415.
Cherokee Intermarriage cases, 203 U. S., 76.

It rests with Congress to determine the time and extent of emancipation. Conferring citizenship and making allotments with fee reserved therein to the United States is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians have been made citizens, the relation of guardian and ward for allotted lands may continue.

Ellis *vs.* Ross, 64 Fed., 714.
Bond *vs.* U. S., 181 Fed., 613.
Beck *vs.* Flournoy Live Stock Real Estate Co., 69 Fed., 30.
U. S. *vs.* Walker, 242 U. S., 452.
U. S. *vs.* Nice, 241 U. S., 591.
Daugherty *vs.* McFarland, 166 N. W., 143.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.

The difference in the character of title held by the Indian tribes to their lands does not in any manner change or diminish the power of Congress over them or their tribal property. This power is the same in all cases.

Gritts *vs.* Fischer, 224 U. S., 640.
U. S. *vs.* Sandoval, 231 U. S., 28.

The title which the Five Civilized Tribes hold in and to their tribal lands is that of a fee-simple title with restrictions upon alienation, and yet Congress has from time to time legislated with reference to such lands so long as the land belonged to the tribe. Congress has frequently seen fit to change the plans previously agreed upon in regard to the distribution of lands to its Indian wards, and an act of Congress may supersede a treaty, and Congress may by subsequent acts repeal, modify or change any of the acts relating to tribal lands without the consent of the tribe.

Head Money cases, 112 U. S. 580.
Eddy *vs.* Robertson, 124 U. S., 190.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.
Brader *vs.* James, 246 U. S., 88; 38 Sup. Ct., 285.
Lone Wolf *vs.* Hitchcock, 187 U. S., 557.
Sizemore *vs.* Brady, 235 U. S., 441.
Cherokee Intermarriage cases, 203 U. S., 76.
Wallace *vs.* Adams, 204 U. S., 415.
Stephens *vs.* Cherokee Nation, 174 U. S., 445.
Choate *vs.* Trapp, 224 U. S., 665.

The interest of individual members in the tribal lands is communal and not individual. No individual Indian has a vested interest in any of the tribal lands. It is only when

a patent is issued to him that his interest becomes vested in any particular tract of land.

If we should consent, for the sake of argument, that the appellant, Hiram Chase, Jr., had a floating right in the unallotted tribal lands, that right would not attach to a particular tract of land until such tract of land had been definitely located, selected, and set apart to the allottee.

Fleming *vs.* McCurtain, 215 U. S., 56.
Marchie Tiger *vs.* Western Insurance Co., 221 U. S., 286.
Muskrat *vs.* U. S., 44 Ct. Cl., 137.
Stephens *vs.* Cherokee Nation, 174 U. S., 445.
Lone Wolf *vs.* U. S., 187 U. S., 553.
Woodbury *vs.* U. S., 170 Fed., 302.
Smith *vs.* Bonifer, 138 Fed., 889.
Hy-yu-tse-mil-kin *vs.* Smith, 194 U. S., 402.
Cherokee Nation *vs.* Hitchcock, 187 U. S., 294.
U. S. *vs.* Kagama, 118 U. S., 375.
Gritts *vs.* Fischer, 224 U. S., 640.

Congress would not have the power to surrender or contract away its general powers over these tribal lands to the Indians or any one else. As long as they remain tribal lands, Congress alone can deal with them, and it is immaterial what kind of a title the tribe holds to the land.

Stone *vs.* Mississippi, 101 U. S., 814.

The mistake appellants make with reference to their right in these tribal lands is that they treat the various acts of Congress with reference to same as a contract between the United States and the Omaha Tribe of Indians, when in

truth and in fact and in law it is not a contract, but only an act of Congress and can have no greater effect. It is nothing more than an exertion of the administrative control of the Government over the tribal property of the tribal Indians and was subject to change by Congress at any time before it was carried into effect and while the property remained tribal property.

Sizemore *vs.* Brady, 235 U. S., 441.
Cherokee Intermarriage cases, 203 U. S., 76.

From the foregoing authorities it is evident that Congress had full power and authority to enact such legislation as it deemed advisable with reference to the tribal lands of the Omaha Tribe of Indians, and it had full power and authority to pass the aforesaid acts of Congress of March 3, 1893 (27 Stat., 630), and the act of May 11, 1912 (37 Stat., 111), without the consent of the Omaha Tribe of Indians, and that said acts are valid and binding, and that none of the plaintiffs herein obtained any vested interest or rights in and to any of the lands under the act of August 7, 1882, which Congress would not have authority to abrogate under the aforesaid acts of 1893 and 1912.

IV.

THE ACT OF CONGRESS OF MARCH 3, 1893 (27 STAT., 630), REPEALS ALL OF SECTION 8 OF THE ACT OF CONGRESS OF AUGUST 7, 1882 (22 STAT., 341).

No demand ever appears to have been made for the patent to the tribe by the tribe or anyone else on its behalf, and as a matter of fact no patent was ever issued. However,

it is a fact that the tribe got into all sorts of trouble over leasing these unallotted lands, and a number of suits were instituted in the various courts in regard to the same, and there was so much confusion and uncertainty about the entire matter that no effort was made to make any allotments of the unallotted lands to children born since July 11, 1884, and no allotments were made as a matter of fact to any Indian children born since that date prior to the passage of the aforesaid act of March 3, 1893. Owing to all of this confusion and uncertainty, apparently by mutual consent of all parties, said section 8 relative to these unallotted lands remained during all of the period prior to the passage of the act of Congress of March 3, 1893, in absolute abeyance, and no attempt was made to carry into effect any of its provisions. Both by the United States and the tribe it was considered, for all intents and purposes, a dead letter. In the meantime a large number of children had been born, who, if the original act were to remain in force and allotments were to be made to them thereunder, would be entitled to only 40 acres each. It became recognized that the act of 1882 was ill-considered in so far as it related to the disposal of the residue of the lands and unfair in discriminating against married women, and also that allotments of 40 acres each were too small to be made practical use of. The amount of land remaining to be dealt with was limited, and the problem was forced upon Congress and the head men of the tribe how to dispose of it to the best interests of all members of the tribe. The situation was met by the enactment of the act of Congress approved March 3, 1893 (27

Stat., 30), a copy of which act is set forth in the bills of complaint herein and on page 8 of brief of appellants herein.

It will be noticed that this act limits the allotments provided for therein to three classes of beneficiaries, all of whom must be living at the date said act became effective. Its purpose was to remedy an existing condition and to equalize allotments thereafter to be made, especially as they related to the married women and minors. The former were added to the list of beneficiaries and the latter are limited to those living at the time the amendatory act was approved, but the amount of land to which each would be entitled was doubled. The legislation covered the entire subject included in section 8 of the former act of August 7, 1882, met the situation as it existed at the latter date, and practically and wisely disposed of the residue of the lands belonging to the tribe, only about 4,000 acres remaining after the allotments had been made.

Clearly the act of 1893 is not so worded as to convey the idea or give the impression that section 8 of the act of 1882 is in full force and effect. Otherwise it would have referred to allotments "now being or may hereafter be made under section 8 of the act of 1882," or in similar language. In other words, the act of 1893 conveys the thought that allotments had been concluded under the act of 1882, and in view of this interpretation no allotments were ever made thereafter under section 8 of the act of Congress of 1882.

It is a well-settled rule in the construction of statutes, often affirmed and applied, that even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly

showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.

1 Fed. Stat. Ann. (2d ed.), sec. 144, p. 167
United States *vs.* Tynen, 11 Wall., 88.
King *vs.* Cornell, 106 U. S., 395.
Murphy *vs.* Utter, 186 U. S., 95-105.
The Paquete Habanna, 175 U. S., 677, 685.

This is true even where the latter act not only contains no repealing clause, but purports to be an amendment of the former law. In such case, where the new law, whether in the form of an amendment or otherwise, covers the whole subject-matter of the former and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication.

Ency. U. S. Reports, Vol. 11, page 98.
36 Cyc., 1082.
Murphy *vs.* Utter, 186 U. S., 95.
Minn. Impr. Co. *vs.* Billings, 111 Fed., 972.

Such is clearly the situation here. The latter act was passed with full knowledge that the proposed allotments, as therein limited, would practically absorb the remaining tribal lands, and all the surrounding circumstances, as well as the language of the act, point to the conclusion that this disposition of the lands would be complete and final.

The evidence in these cases, and the petition of the Indians to proper authorities, and the departmental orders, and the communications of the officers of the Government with these Indians prior to and leading up to the passage of the act of March 3, 1893, and the fact that the Omaha

Tribe of Indians accepted the act of 1893, and it was explained to the tribe by the executive officers of the United States charged with the execution of this law, that under this act no allotments could be made to Indian children born after March 3, 1893, conclusively show that the interpretation placed upon said act by the Department and the Indians was full and complete so far as the allotment of the unallotted land of the Omaha Tribe of Indians was concerned.

In support of the fact set forth in the last paragraph above, the court's attention is called to the petition or communication from the Omaha Tribe of Indians assembled in council January 2, 1891, addressed to the Hon. T. J. Morgan, Commissioner of Indian Affairs (Rec., 33-34-36). The second paragraph of said petition sets forth the reason why the tribe desires the act of Congress of August 7, 1882, amended; also to a letter dated August 24, 1891, from Robert H. Ashley, U. S. Indian agent, to the Commissioner of Indian Affairs (Rec., 36), wherein he sets forth that the Indians desire that the act of Congress of August 7, 1882, be amended; also to a letter dated May 11, 1892, from Robert H. Ashley, United States Indian agent (Rec., 36-37), wherein he states that the Omaha Indians are desirous of sending a delegation to Washington for the purpose of taking proper steps to have the act of Congress of August 7, 1882, amended; also a letter of R. V. Belt, acting Commissioner, to Robert H. Ashley, dated May 19, 1892 (Rec., 37), wherein he states that it is not necessary for these Indians to come to Washington, as the Department will see that an amendment to said act of 1882 is introduced in Congress; also a letter from Alice C. Fletcher to the Commissioner

of Indian Affairs, dated February 6, 1893 (Rec., 38), asking that the act of 1882 be amended so that 80 acres may be allotted to the minor children of the Omaha Tribe; also to the Congressional Record, 52d Congress, second session, page 2347, wherein said amendment was introduced in Congress and was agreed to without debate; also the memorandum of conversation between the Commissioner of Indian Affairs and Philip Stabler and George Miller, members of the Omaha Tribe (Rec., 38, 39, 41, 42); also petition to the Commissioner of Indian Affairs, signed by said Omaha Indians, dated February 20, 1893 (Rec., 42-43); also a letter from A. C. Tonner, acting Commissioner of Indian Affairs, to John K. Rankin, U. S. special agent, who was delegated to allot these lands under the act of March 3, 1893, which letter is dated April 24, 1899 (Rec., 26-32). On pages 29 and 30 of the record the Commissioner instructs the allotting agent, Rankin, with reference to the allotment under this act of 1893 as follows:

> "The act of August 7, 1882, provides that the unallotted lands should be held in common by the tribe and a trust patent issued therefor; and that from these unallotted lands allotments should be made to each Omaha Indian child born prior to the expiration of the trust period (25 years) and trust patents issued therefor, which patents, it was provided, should override the tribal patent.
>
> "The tribal patents have not been issued, however, and no allotments have been made to children born since the original allotments were completed.
>
> "It is held that the effect of the act of March 3, 1893, is to give each and every member of the Omaha Tribe who was alive on that day, and who had not previously received that quantity, 80 acres of land.

"There are three classes to be allotted:

"1st. Married women who had not received allotments or who had received but 40 acres, now entitled to 80 acres, less amount previously allotted.

"2d. Those who were allotted as minors, and are now each entitled to 40 acres additional.

"3d. Those born since the original allotments were made, entitled to 80 acres each.

"The first class includes widows, who were not allotted originally.

"You will observe that no person who died before March 3, 1893, is entitled to an allotment, nor is any person who was born after that date. * * *

"In connection with the agent you will call a full council of the male adult members of the tribe, and lay before them the provisions of the act of 1893, which should be fully explained to them on the lines above indicated. Their consent should be asked and a vote taken. The affirmative votes should be a majority of all the male members of the tribe. If a full council can be had it will not be necessary to obtain the consent of the tribe in writing, but if a majority cannot be assembled you will report the fact to this office for further instructions.

"It is understood, however, that the Indians are anxious to have the allotments made.

"The proceedings of the council and the result of the vote should be duly attested by the agent.

"Having obtained their consent you will proceed to make the allotments as before indicated. Adult members should be permitted to make their own selections, heads of families selecting for their minor children and the heirs of the deceased allottees selecting for the person from whom they inherit."

On page 42 of the record is the report of the allotting agent, stating that he had called a meeting of the tribe and they had almost unanimously accepted the provisions of the law of March 3, 1893, providing for the additional allotments of their surplus lands, and on page 32 of the record is the certificate of Charles P. Mathewson, United States Indian agent, dated May 10, 1899, showing a tribal meeting had been called and that Major Rankin had fully explained the act of 1893, and the effect of the law in regard to the same. The act having been read to the tribe, they voted upon it, 156 male members voting in favor of the provisions of the law and none voting in the negative.

The Omaha Indians at this meeting and after this meeting when the allotments were being made by Major Rankin, fully understood that no allotments were to be made to Indians born since March 3, 1893, and the United States has ever since refused to make any such allotments to such Indians. The letter of C. H. Hauke, Second Assistant Commissioner, to John L. Webster, dated September 6, 1912 (Rec., 25), confirms this statement with reference to the position of the United States. The tribe has always acquiesced in this interpretation by the Department and has always understood and accepted the act of 1893 on the understanding that no allotments were to be made to Indians born since March 3, 1893, and that the act of 1882 had no further application so far as allotment of tribal lands was concerned.

The tribe in open council gave its consent to this plan of allotment and adjustment of unallotted lands, and through the co-operation of the administrative officers of the United States and the Omaha Tribe the plan was carried to completion, and the United States and the tribe have in all their

dealings with reference to said act of March 3, 1893, proceeded upon the theory that no allotments would be made to Indians born since March 3, 1893, and that no further allotments were to be made under the act of August 7, 1882.

The evidence of W. T. Diddock (Rec., 82, 83), Edward Farley (Rec., 84), and Caryl E. Farley (Rec., 78) is to the effect they were present at this meeting of the Omaha tribe on May 9, 1899, for the purpose of accepting or rejecting the act of March 3, 1893, and that Major Rankin fully explained to the tribe that no allotments would be made to children born since March 3, 1893, and that although this was a disappointment to many, as many had children who were born since March 3, 1893, who would receive no allotments at all, yet the tribe, after this explanation was made, accepted the bill and the tribe has ever since acted upon the theory and thought that children born after March 3, 1893, were not entitled to any allotments from the tribal lands.

It is a rule of law that in construing a treaty between the United States and an Indian tribe the treaty must be construed, not according to the technical meaning of its words to the learned lawyer, or the technical meaning of its words as between citizens of the United States, but, on the contrary, the words in a treaty should be construed in the light of the recognized relations between the Government and the Indian and the established policy of the former towards the latter, and as the United States and the Indians must have understood the treaty at the time it was made, regardless of technical meaning of the words or conditions that may have subsequently developed.

Kansas Indians, 5 Wall., 737.

Choate *vs.* Trapp, 224 U. S., 665.

Shultis *vs.* McDougal, 162 Fed., 331; 170 Fed., 529.

The executive officers of the United States, charged with the execution of this law, have construed it as herein contended for by the United States, and have consistently refused to recognize the right of children born since March 3, 1893, to any allotment whatever out of any of the unallotted lands belonging to the Omaha Tribe of Indians. Their construction is not conclusive, but is entitled to much weight. The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be annulled without cogent reasons. The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret. In the present case the record shows, and it is a fact of which this court will take notice, that the act of March 3, 1893, was drafted by the officials of the Department of the Interior.

U. S. *vs.* Winnonna R. R. Co., 32 U. S. Appeals, 274.
U. S. *vs.* Hermanos Y. Campani, 209 U. S., 337.
U. S. *vs.* Hammers, 221 U. S., 220.
Robertson *vs.* Downing, 127 U. S., 607.
U. S. *vs.* Healey, 160 U. S., 136.
Brown *vs.* U. S., 113 U. S., 568, 571.
U. S. *vs.* Burlington Ry., 98 U. S., 334.
Kansas Pacific Ry. *vs.* Atchison Ry., 112 U. S., 418.
U. S. *vs.* Barber, 41 U. S. Appeals, 424.
Grossett *vs.* Townsend, 86 Fed., 908.
U. S. *vs.* Alabama R. R. Co., 142 U. S., 615.
In Schell's Executors *vs.* Fauche, 138 U. S., 562.
U. S. *vs.* Johnson, 124 U. S., 236.
U. S. *vs.* Philbrick, 120 U. S., 52.

U. S. *vs.* Hill, 120 U. S., 169.
Peabody *vs.* Stark, 16 Wall., 240.
In the 5 Per Cent cases, 110 U. S., 471.
Hahn *vs.* U. S., 107 U. S., 402.
U. S. *vs.* Pugh, 99 U. S., 265.
Hastings Ry. *vs.* Whitney, 132 U. S., 357-366.
U. S. *vs.* Moore, 95 U. S., 760-763.

It is also a well-settled rule of law that when a contract is entered into the court gives the same construction to the contract as the parties to the contract had given it, provided said construction by said parties is not against public policy. Congress and the Omaha Indians acting in agreement intended by the passage of the act of March 3, 1893, and its acceptance by the tribe, wholly to supersede so much of the act of 1882 as was contained in section 8 thereof and which related to the unallotted lands, and to that extent to repeal the former law. The Indians agreed in open council, when accepting said act of 1893, that no allotments should be made out of the unallotted lands to children born since 1893, and that no further allotments should be made under the act of 1882, and no allotments have been made since that time under the act of 1882. Both acts deal with the same subject-matter, and the whole thereof, to wit, the lands remaining unallotted under the act of 1882. The Indians further agreed when accepting the act that the allotments should be limited to those living on March 3, 1893, and no further allotments were to be made under the act of 1882.

V.

THE ACT OF CONGRESS OF MAY 11, 1912 (37 STAT., 111), REPEALS ALL PARTS OF THE ACTS OF CONGRESS OF AUGUST 7, 1882 (22 STAT., 341), AND MARCH 3, 1893 (27 STAT., 630), SO FAR AS SAID ACTS RELATE TO THE ALLOTMENT OF THE UNALLOTTED TRIBAL LANDS, AND SAID ACT PROVIDES A COMPREHENSIVE AND COMPLETE PLAN FULLY AND COMPLETELY TO DISPOSE OF ALL OF THE UNALLOTTED LANDS OF THE OMAHA TRIBE OF INDIANS, WHICH IS ENTIRELY DIFFERENT FROM THE PROVISIONS FOR ALLOTMENT OF THESE LANDS UNDER ACTS OF 1882 AND 1893.

It is true the act of May 11, 1912, does not purport to repeal all of the acts of August 7, 1882, and March 3, 1893, because allotments had been made out of the tribal lands under both of said acts and as to these allotted lands the rights of allottees therein had become vested and Congress would have no authority to disturb the rights of allottees therein without their consent, but as to the unallotted tribal lands said act of Congress of May 11, 1912, repeals all that part of the acts of 1882 and 1893 which relates to the allotments out of the unallotted tribal lands.

No express repealing clause is attached to the act of May 11, 1912, but when all the facts and circumstances and contemporaneous history surrounding the passage of this act is taken into consideration, it was not necessary to add a repealing clause to said act stating it repealed the acts of 1882 and 1893, and such a repealing clause would have served no purpose. The bill as it was finally enacted fully and com-

pletely repeals all of the acts of 1882 and 1893 so far as they relate to the unallotted tribal lands.

The evidence shows that as far back as 1909 the Omaha Tribe of Indians and the tribal council were active in passing resolutions and making requests for legislation providing for the sale of these unallotted tribal lands and sending delegates to Washington to urge the proper authorities to have such legislation enacted. And these meetings of the tribe and council continued from time to time until Congress finally passed the act of May 11, 1912.

During this period the Secretary of the Interior and the Commissioner of Indian Affairs were in communication with the tribe and council and were making reports and submitting drafts of bills to the proper committees in Congress requesting the legislation for the sale and disposition of these unallotted lands. All these communications and resolutions of the tribe to the Secretary of the Interior, the Commissioner of Indian Affairs, and the various officials connected with these offices, show that the Indians, as well as the Secretary of the Interior, deemed it impractical, unfair, and unjust to make any allotments under the acts of 1882 or 1893, and that the most equitable proceeding would be to have a bill passed providing for the sale of all these unallotted lands and the money distributed *pro rata* among the Indian children born since March 3, 1893, and who have not received any allotments. The bill also provided for disposing of certain of these lands upon which the Government agency buildings are located; also the Presbyterian church, to which many members of the tribe belong, and also the cemetery which the Indians used to bury their dead. The various communications between the Omaha Tribe and the

Secretary of the Interior show that all phases of the act of May 11, 1912, were gone into and discussed.

Exhibit 32 (Rec., 65) is the report of A. G. Pollock, agent and superintendent of the Omaha Tribe of Indians, to the Commissioner of Indian Affairs stating the Omaha Indians in open council requested and desired the unallotted tribal lands sold and the proceeds divided among the children born since March 3, 1893.

Exhibit 33 (Rec., 68) is the report of Albert H. Neale, superintendent and disbursing agent of the Omaha Tribe of Indians, stating that on January 17, 1912, a notice had been given for a tribal and council meeting of the Omaha Indians to be held at Macy, January 24, 1912, for the purpose of taking definite action with reference to the sale and disposition of the tribal lands, and that on said day the council and tribe did, by a unanimous vote, decide to ask Congress to pass a bill for the sale of the unallotted lands, and the proceeds to be divided among the Omaha Indian children born since March 3, 1893, and who have no allotments. And at the same meeting they elected three delegates to go to Washington to present to the proper authorities the wishes and desires of the Omaha Council and Tribe of Indians in regard to these unallotted lands. Thomas McCauley testifies all members of the council were in favor of selling the lands, and all were present (Rec., 75).

Harvey Lyon testified that he was present at this tribal and council meeting on January 24, 1912, and that the report of the agent was correct, and that the council of said tribe elected Thomas McCauley, Daniel Webster, and Frank La Flesche as delegates to go to Washington and present the views of the Omaha Council and Tribe for legislation pro-

viding for the sale and disposition of these unallotted lands (Rec., 77, 78).

Thomas McCauley testified that he was also present at the tribal and council meeting, and that he was one of the delegates elected to go to Washington to present to the Secretary of the Interior and proper officers the views of the tribe and council for the sale of these unallotted lands, and that he and the other two delegates did go to Washington, and they presented the views of the tribe to Daniel V. Stephens, who was Congressman from the Third District of Nebraska, in which these lands are located, and also to Senator Brown, from the State of Nebraska; and also to the Secretary of the Interior and the Commissioner of Indian Affairs, and stated that the expenses of this delegation were paid from the tribal funds of the Omaha Indians (Rec., 75, 76).

Levi Levering testified that he was present at this council meeting and was the official interpreter, and that the report of Albert H. Neale, superintendent, is correct (Rec., 78).

Caryl E. Farley testified that he was present at this council meeting and that the report of Albert H. Neale, superintendent, is correct (Rec., 78-82, 84).

Walter T. Diddock testified that he was present at the council meeting, and that the report of Albert H. Neale is correct (Rec., 82, 83).

Amos Mitchell testified that he was present at this meeting and that the report of Albert H. Neale, superintendent, with reference to this matter, is correct (Rec., 84).

All of these witnesses testified that at this meeting the members of the tribe discussed fully these unallotted lands, and that with few exceptions they were all in favor of having a bill passed by Congress authorizing the sale of same and

the money distributed *pro rata* among the Omaha Indian children born since March 3, 1893, and who had no allotments.

Exhibit 34 (Rec., 70) is a petition of various members of the Omaha Tribe of Indians to the Commissioner of Indian Affairs, which was received February 6, 1909, asking for the passage of a bill authorizing the sale and disposition of these unallotted lands, and that the proceeds derived therefrom be divided equally among the Omaha Indian children born subsequent to the act of March 3, 1893, and who are living at the time said land is sold.

Exhibit 35 (Rec., 73) is a letter from the Assistant Commissioner of Indian Affairs, F. H. Abbott, dated March 13, 1912, acknowledging receipt of a petition signed by 140 members of the Omaha Tribe of Indians asking for the reintroduction of the bill in the United States Senate for the sale of these unallotted lands.

On page 66, Record, is a petition to the Secretary of the Interior, signed by members of the Omaha Tribe, requesting that the bill introduced in Congress for the sale of the Omaha tribal lands remaining unallotted, be reintroduced and that they recommend the passage of the same.

On page 61, Record, appears a communication to the Speaker of the House of Representatives by James Rudolph Garfield, the then Secretary of the Interior, submitting a bill to Congress providing for the sale of these unallotted lands, which bill finally became a law on May 11, 1912, and in his report accompanying the bill he gives the reason for asking for its passage.

The first bill relative to the sale of these unallotted lands was introduced in Congress in 1909, but failed of passage,

and on June 25, 1909, we find Franklin Pierce, First Assistant Secretary of the Interior, making a report to the Commissioner of Indian Affairs relative to said unallotted lands, wherein he virtually takes the same position as Secretary Garfield (Rec., 44-47).

Exhibit 31 (Rec., 53) is an excerpt of proceedings of Congress of May 6, 1912, relative to this act of May 11, 1912, and the discussion thereon.

On page 59, Record, there is a letter from Samuel Adams, Acting Secretary, to Hon. Robert J. Gamble, chairman Committee on Indian Affairs, United States Senate, dated February 14, 1912, wherein he discusses the various phases of this bill, which finally resulted in the act of **May 11, 1912.**

A copy of the act of May 11, 1912, appears on page 63, Record.

It will thus be seen that Congress, the Secretary of the Interior, and the Omaha Tribe of Indians had for some years been considering the matter of the disposition of these unallotted lands, and it was finally the deliberate judgment of Congress, as well as of the Omaha Tribe of Indians, that the act of May 11, 1912, was the most equitable and just disposition to be made of these lands.

Furthermore, the 85 plaintiffs in these various suits belong to about four families, and with a few exceptions are all mixed-bloods, and the land asked for by them takes up practically all the suitable unallotted lands and leaves only some willow patches and sand bars along the Missouri River for the full-blood Indians. Is it reasonable to presume that the council of the Omaha Tribe of Indians, the tribe itself, the Commissioner of Indian Affairs and his agents, the Secretary of the Interior, and Congress ever intended said

act to be so construed as to bring about such a result? If the act of 1912 did not repeal all parts of the acts of 1882 and 1893 with reference to these unallotted tribal lands, no purpose would be served in its passage.

We thus see that Congress, the Secretary of the Interior, and the Omaha Tribe of Indians did not deem it advisable to make any further allotments under the acts of 1882 and 1893 out of these unallotted lands, and that the act of May 11, 1912, should completely and fully govern the entire disposition of said lands.

It would have served no purpose to insert a repealing clause in the act of 1912, because the history of the act and the act itself provides a full, complete, and comprehensive plan for disposing of all of the unallotted tribal lands. And the plan set forth in the act is entirely different from the plan in either of the acts of 1882 or 1893. The Secretary of the Interior could not make allotments under the acts of 1882 and 1893, and at the same time co-operate and carry out the provisions of the act of 1912. The provisions of the act of 1912 providing for the sale and disposition of the unallotted lands are repugnant to the provisions of the acts of 1882 and 1893, in so far as the unallotted tribal lands are concerned. To say that the Secretary of the Interior has authority to make allotments out of the unallotted tribal lands under the acts of 1882 or 1893 is to arbitrarily ignore and judicially defeat the object and purpose and decision of the Omaha Tribe of Indians in council assembled and the object and purpose of Congress in enacting the law of 1912. If the court should hold appellants in this action and the other 83 plaintiffs whose suits are now pending in the United States District Court, Omaha Division, all of whom have

made their selections for allotments and instituted their suits against the United States subsequent to the passage and approval of the act of May 11, 1912, are entitled to these allotments regardless of the act of 1912, it would amount in effect to a repeal of the act of 1912, as the land claimed by these various plaintiffs practically takes up all the unallotted tribal lands and there would be nothing further for the Secretary of the Interior to do under the act of 1912. Furthermore, if the plaintiffs in these various suits are entitled to allotments asked for in their various bills of complaint, it would be impossible for the Secretary of the Interior to carry out the provisions of section 2 of the act of May 11, 1912, as all the lands provided for in section 2 are taken up by these various plaintiffs. Upon the lands set forth in said section 2 are located all the Government buildings, including office building, barns, hog barns, cribs, granary, machine shop, blacksmith shop, etc. On a part of these lands is a large Presbyterian church, Presbyterian mission building, a cemetery where the Indians have buried their dead for many years, and these various plaintiffs are asking to have these lands, with all these improvements, allotted to them regardless of the provisions of the act of 1912.

The passage of the act of 1912 comes within the rule of law heretofore set forth in this brief, that where two or more acts are passed and the later act, whether in the form of an amendment or otherwise, covers the whole subject-matter of the former and is inconsistent with it and evidently intended to supersede and take the place of it, would operate as a repeal of the old law.

1 Fed. Stat. Ann. (2d Ed.), Sec. 144, p. 167.

United States *vs.* Tynen, 11 Wall., 88.

King *vs.* Cornell, 106 U. S., 395.
Murphy *vs.* Utter, 186 U. S., 95, 105.
The Paquete Habana, 175 U. S., 677, 685.
Ency. U. S. Reports, vol. 11, p. 98.
36 Cyc., 1082.
Minn. Impr. Co. *vs.* Billings, 11 Fed., 972.

Furthermore, the record shows that if these lands are to be allotted under the acts of 1882 and 1893, then only a few of the Omaha Indians who have been born since 1893 would obtain any allotments at all, as the number of acres subject to allotment have practically all been taken up by the plaintiffs in these various suits, and there are perhaps 500 or 600 Indian children born since March 3, 1893, who would not receive any allotments. So to construe the law as to give to a few to the exclusion of all others would be to work inequality and hardship, which intention should not be imputed to Congress so long as another and more reasonable construction is possible.

Knowlton *vs.* Moore, 178 U. S., 41-47.
U. S. *vs.* Jackson, 143 Fed., 783.

Counsel for appellants argue that inasmuch as the act of 1912 does not contain any repealing clause, therefore the acts of 1882 and 1893 are still in full force and effect and the allotments for the unallotted lands can still be made under the provisions of said two acts, and cites in support thereof the cases of Frost *vs.* Wenie, 157 U. S., 46, and United States *vs.* Hemmer *et al.*, 241 U. S., 379.

Neither of these cases is in point, and is not applicable to the facts in the cases at bar. In the case of Frost *vs.*

Wenie, the question arose over the act of December 15, 1880, abandoning the Fort Dodge military reservation and directing the Secretary of the Interior to cause certain parts of the same to be surveyed as other public lands and to offer the same to actual settlers only under and in accordance with the homestead laws of the United States. Within this reservation so abandoned were certain lands, amounting to about one twenty-fifth of the entire tract opened up for settlement, which belonged to the Osage Indians and held in trust for them by the United States under various acts of Congress, all prior to the act of December 15, 1880. Nothing was said in the act of December 15, 1880, about these Osage lands within the abandoned military reservation, and that act in no way dealt with these Indian lands and had nothing whatever to do with them. It dealt with an entirely different subject-matter, and the matter of Indian lands or Indian title or Indian rights in and to this part of the reservation, belonging to the Osages, was in no way mentioned by Congress, and the court rightfully held that it was not fair to presume that Congress, in passing the act of December 15, 1880, intended to include therein for settlement, under the general homestead laws, the Osage lands located in said reservation which the United States was holding in trust for said tribe without making a special reference to that fact. Both laws could be carried into effect without invalidating either one of them.

In the cases at bar we find the act of Congress of May 11, 1912, relates to the same subject-matter as the acts of 1882 and 1893, namely, the Omaha Tribe of Indians and the disposition of their unallotted tribal lands. The act of May 11, 1912, is the last expression of Congress on this matter of

unallotted Omaha tribal lands, and, as hereinbefore stated, provides a full and complete plan for the disposition of these unallotted lands and is entirely different from that found in the acts of 1882 and 1893, and the object of the acts of 1882 and 1893 relative to these allotted lands cannot be carried out without violating the provisions of the act of 1912.

The case of the United States *vs.* Hemmer *et al.* is a case wherein one Henry Taylor, a Sioux Indian, made a homestead entry under the act of March 3, 1875 (18 Stat., 420), giving the Indians under certain conditions the benefit of the homestead laws. Taylor came within this class and selected his homestead and made his preliminary entry October 7, 1878, and he established and continued his residence thereon and made satisfactory proof as required by law, except he did not make his final proof until December 11, 1884, when he paid his final fees and received his final receipts and certificate. Prior to making final proof, Congress passed the act of July 4, 1884 (22 Stat., 96), which act was more general in its terms than the act of 1875. The United States issued the patent to said land to Taylor under the act of 1884, instead of the act of 1875, under which he made the entry. Taylor maintained the patent should be issued to him under the act of 1875. The question was which act applied to and determined Taylor's rights. Was the act of 1875 repealed by the act of 1884, which act contained no repealing clause? The court in its opinion says:

> "Unquestionably the act of 1884 is the more general, and has criteria of application different from that of the act of 1875. The acts, therefore, have different objects. Under the act of 1884 Indians located on the public lands at the passage of the act, *or* that might, under the direction of the Secretary

of the Interior, or otherwise, thereafter so locate, might avail themselves of the provisions of the act. The act of 1875 was more circumscribed. It did not apply to Indians generally, but to those of special qualifications—those who had separated themselves from their tribes and the influence of their tribes, who had advanced, therefore, to a higher status and were better prepared to manage their affairs than Indians in general. And it might well have been considered that a five years' restriction upon the alienation of their titles, added to the five years' residence, would give them an appreciation of values sufficient to protect them against the improvidences of their race and the imposition of others. Therefore the acts had no repugnancy, but had different fields of application, and this, it might be contended, even considering their future operation. Of this, however, we need not express opinion. The act of 1884 applied to Indians then located on the public lands. Regarding Taylor simply as an Indian, those words might be considered to be applicable to him; regarding the purpose of the act, which was to confer a benefit, not confirm one, they did not apply to him or to Indians in his situation, for he, and such Indians as he, were the beneficiaries of the prior act, and he and other Indians, it may be—but certainly he—had substantially performed its conditions. What remained to be done, and could have been done before the act of 1884 was passed, was not much more than ceremony. Nor does the fact that the act of 1884 applied to such Indians as might then be located upon the public lands broaden it so as to include Indians who were proceeding under the act of 1875. The rule is established that under the acts of Congress concerning the public lands those are not regarded as such to which a claim was attached, though Congress may, if it be so advised, exercise control over them. * * * Tay-

> lor and those in like situation did not need the aid of the act of 1884. Its language was not of confirmation of rights, but was permissive and prospective, and related to the initiation and acquisition of rights by a different class. And having this definite purpose, it would be difficult to suppose that, besides, rights acquired under prior laws were intended to be limited without reference to such laws. This view makes it unnecessary to inquire whether Taylor's rights had progressed beyond the point of subjection to the power of Congress, he having, as we have said, completed his residence upon the land, and nothing remained but to make final proof and receive the assurance of his title, which, we have seen, was his situation nearly a year before the passage of the act of 1884."

We thus see these two acts of Congress of 1875 and 1884 had different objects and purposes and therefore do not come within the facts existing in the cases at bar or within the rule of law governing the act of May 11, 1912. Furthermore, in this case Taylor's rights had become fixed under the act of 1875 and prior to the passage of the act of 1884, and the court properly held that it would not presume Congress intended to take away these rights from Taylor without expressly so stating.

In the cases at bar, if the various claimants had prior to the passage of the act of May 11, 1912, established or fixed their rights to the various tracts of land and had done all that was necessary for them to do under the rules and regulations of the Secretary of the Interior under the acts of 1882 and 1883 and there was nothing further for them to do to establish their rights therein, then there might be some force to the argument that these cases come within the rule

laid down in United States *vs.* Hemmer *et al.* But in none of these cases did any of the claimants, prior to the passage of the act of May 11, 1912, establish or fix their rights to any of the land sued for by them in their various bills of complaint. When the act of 1912 was passed, all the rights of complainants in these suits, if any they had, were inchoate, and Congress had the power and authority to change, alter, or dispose of these unallotted tribal lands sued for by these plaintiffs as it deemed advisable and proper, and by so doing would in no way infringe upon the rights of any of the plaintiffs to the lands asked for by them in these various suits.

VI.

THE EVIDENCE INTRODUCED IN THESE CASES RELATING TO THE NUMBER OF ACRES OF UNALLOTTED LAND AND THE EVIDENCE RELATING TO THE ACTIONS OF THE MEMBERS OF SAID TRIBE AND THE ACTIONS OF THE COUNCIL OF SAID TRIBE AND THE PETITIONS PRESENTED TO THE INTERIOR DEPARTMENT ARE REVELANT FOR THE PURPOSE OF SHOWING THE HISTORY, OBJECTS, AND PURPOSE OF SAID ACT.

This evidence was introduced for the purpose of showing the conditions relative to these unallotted lands and the contemporaneous history connected therewith preceding the passage of the act of May 11, 1912, and the conditions which Congress and the Indians were trying to remedy and change by and through that act.

The evidence shows that the Omaha Tribe of Indians, and also the tribal council, which is the representative body of the tribe and which had authority to deal for the tribe in

all tribal matters, with very few exceptions, were all in favor of having the unallotted tribal lands sold and the proceeds divided *pro rata* among the children born since March 3, 1893, and that there was only sufficient unallotted lands to make allotments to a comparatively few of the Indian children born since March 3, 1893, and if the land was allotted *pro rata* among all the children living born since March 3, 1893, it would only amount to a few acres to each Indian, and the amount would be so small that it would be practically valueless.

It was not necessary for the United States to show that a majority of the Omaha Tribe of Indians petitioned Congress and the Secretary of the Interior asking for legislation authorizing the sale of these tribal lands. The council of the Omaha Tribe of Indians is the only body that could give legal expression to the desires and wishes of the Omaha Tribe of Indians. We find said council on two occasions asking that these lands be sold and the proceeds divided among children born since March 3, 1893. Exhibits 32 (Rec., 65) and 33 (Rec., 68).

The council in all its dealings with reference to these unallotted lands seems to have been unanimous in this matter of asking to have these unallotted lands sold, and the action of the council seems to have represented the ideas of the tribe in general. The only record we have of any dissension is that of a letter written by Hiram Chase to Theodore Roosevelt, President of the United States, on February 11, 1909, but the record herein would seem to indicate that he must have changed his mind with reference to this matter since he wrote this letter, as we find that he was present at the

council meeting of January 24, 1912, wherein the council voted on the question of sending delegates to Washington to secure the passage of a bill providing for the sale of the unallotted lands of the Omaha Tribe. And Albert H. Neale, S. D. A., states in his report to the Commissioner of Indian Affairs that this question was put to the tribe and the council and 56 voted in favor of the same and none opposed it. He also states that Hiram Chase was present, and stated there were doubtless other matters besides those set forth in the call which should be taken up by this delegation. This report of the superintendent is not contradicted by anyone, and we apprehend it is a true expression of what took place at this council meeting. If Mr. Chase at this time was opposed to the sale of these unallotted lands, he no doubt would have voted against the resolution (Rec., 68, 69, 70).

Appellants lay great stress on the letter written by Hiram Chase to Theodore Roosevelt, President of the United States, complaining about the actions of the tribe relative to the sale of these tribal lands, and charging that the persons seeking the sale of these lands were a "gang of grafters and speculators," etc. The exhibits heretofore referred to by appellee showing the passage of various resolutions by the said tribe asking for legislation authorizing the sale of these unallotted tribal lands and the money prorated among Omaha Indian children born since March 3, 1893, show Hiram Chase and his followers overwhelmingly outvoted in these council meetings, and that this letter of Mr. Chase does not represent the voice of the council or tribe, but, on the contrary, represents only his own view and that of a few of his followers. The great majority of the council and the tribe have almost from the beginning of the agita-

tion of this question of selling the remainder of these tribal lands been in favor of selling same. Inasmuch as about this time Theodore Roosevelt was using quite freely what was popularly known as the "Big Stick" on grafters, we presume Mr. Chase thought by making broad charges of graft and speculation he would get the sympathy of President Roosevelt, and in that way defeat legislation for the sale of these lands, which he could not do by vote in his own Council.

Mr. Chase had, and has now, a direct interest in preventing the sale of these lands. He represents four sons who are plaintiffs in these various suits, and also a number of relatives who are plaintiffs in these suits. Financially it has always meant much to his family to defeat the sale of these lands and to try to obtain for his family allotments under the act of 1882.

Appellants argue that inasmuch as Caryl Farley, one of the witnesses for the appellee, was a real-estate agent living at Sioux City, Iowa, and he and others were interested in having the land sold for speculative purposes, therefore his evidence should not have as much weight as that of Hiram Chase and the appellants herein. There is nothing in the record to show that the fact that Caryl Farley may be dealing in real estate is any reason why he should be interested in having these unallotted lands sold. He is a part Omaha Indian, on the roll, the same as Mr. Chase. He has four children, all of whom were born since March 3, 1893. He has brothers, sisters, and cousins, who are part Omaha Indians, who have been born since March 3, 1893, and many of the full-blood Indians have been coming to him for a number of years for advice in all their affairs, and what

would be more natural for him than to take such action as he deemed necessary to obtain the required legislation to have these tribal lands sold if he thought that was for the best interest of the tribe as well as for his own family? The fact that he wanted these lands sold is no reason for supposing that he would thereby profit by the same any more than that his children would get their proportionate share. The act provides the land shall be sold at public sale, and anyone who knows anything about the sale of Indian lands on the Omaha reservation knows he pays all the land is worth when he buys at public auction.

VII.

THE ACT OF CONGRESS OF MAY 11, 1912, IS MANDATORY AND PEREMPTORY UPON THE SECRETARY OF THE INTERIOR TO SELL THE UNALLOTTED LANDS AND TO CARRY OUT THE PROVISIONS OF THE ACT, AND SAID ACT TOOK EFFECT ON MAY 11, 1912, THE DAY OF ITS APPROVAL, AND NEEDED NO PROMULGATION TO GIVE IT OPERATION.

The words of a statute are to be construed with reference to the subject-matter of the enactment and to the object sought to be attained. Their meaning is to be found, not so much in the strict etymological propriety of language, nor even in its popular use, as in the subject or occasion on which they are used. In conformity with the ruling that the meaning of words is to be adapted to the particular subject-matter in reference to which they are used, general words are to be restricted or expanded to suit the subject-matter, and per-

missive words in a statute may be mandatory and mandatory words may be directory.

Cyc., 36, 1159.

Reiche *vs.* Smythe, 13 Wall., 162.

Moore *vs.* Amer. Transport Co., 24 Howard, 1.

U. S. *vs.* Saunders, 22 Wall., 492.

Bremer *vs.* Blouchcr, 14 Pet., 445.

Supervisors Rock Island County *vs.* U. S., 4 Wall., 435.

Galena *vs.* Amy, 5 Wall., 705.

Boswell *vs.* Big Vain *vs.* Pocahontas Coal Co., 217 Fed., 822.

8 Op. Atty. Gen., 546.

Floyd's case, 2 Ct. Cl., 429.

1 Fed. Stat. Ann. (2d Ed.).

In case of Ralston *vs.* Crittenden, 13 Fed., 508, it was held that a State auditor, "authorized and required" by statute to transfer moneys to the sinking fund and thereupon to call in for payment a like amount of State funds, had no discretion in the matter, and it was mandatory.

Under an act of Congress "authorizing the Secretary of Agriculture" to make rules and regulations to prevent the transportation of infected cattle, etc., held to impose a duty under the general rule that permissive words in a statute are peremptory when used to clothe a public officer with power to do an act which concerns the public interest.

1 Fed. Stat. Ann. (2d. Ed.), Sec. 7, p. 18.

Under an act by which the Secretary of War was "authorized" to reopen the settlement made by the United

States with a certain railroad company, the exercise of the power was adjudged to be imperative upon application by the party interested.

1 Fed. Stat. Ann. (2d Ed.), Sec. 7, p. 18.

Where a public body or officers have been clothed by a statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty and the same is mandatory, though the phraseology of the statute be permissive only, and not peremptory.

The Mayor of New York *vs.* Furre, 3 Hill 612, 615.
Minor *et al. vs.* The Mechanic's Bank of Alexandria, 1 Pet. 46, 64, and note.
Mason *vs.* Fearson, 9 Howard, 248.
Livingston *vs.* Tanner, 14 N. Y., 64.

Thus the act of May 11, 1912, was not passed for the benefit of the Secretary of the Interior or to protect him in any way, but was passed for the benefit of the Indians and the disposition of their tribal lands. The Secretary of the Interior has no option or discretion in the matter of proceeding under this act, and he is obliged to carry out the provision of said act for the benefit of the parties therein designated and he does not have the power to defeat the object and purpose of the act by refusing to put it into operation when he deems it advisable.

A particular construction of a statute which will occasion great annoyance or produce inequality or injustice, is to be avoided if another, more reasonable, interpretation is present in the statute.

Knowlton *vs.* Moore, 178 U. S., 41.

When power is given to public officers, whenever public or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. In such cases it is held that the intent of the legislature was not to develop a mere discretion, but was to impose an imperative and absolute duty.

Supervisors Rock Island County *vs.* U. S., 4 Wall., 435.

One of the surest tests of statutory construction is whether the interpretation contended for will render the statute ridiculous and inoperative.

International Railroad Co. *vs.* U. S., 238 Fed., 317.

Hills *vs.* F. D. McKinniss Co., 188 Fed., 1012.

A literal interpretation of any part of a statute will not be adopted if it would operate unjustly or lead to absurd results or contrary to the evident meaning of the act taken as a whole.

Merchants National Bank of New Haven *vs.* U. S., 214 Fed., 200.

A statute should receive such construction as tends to remove the mischief or evil at which it is aimed, rather than one which permits the evil to continue.

Harper *vs.* Victor, 212 Fed., 903.

A rational, practical interpretation intending to promote the purpose of the statute should be preferred to one which is unreasonable or impractical or which would hinder the accomplishment of the purposes and objects of the statute.

U. S. *vs.* Missouri Pacific Railroad Co., 213 Fed., 169.

The object which the legislature sought to obtain by a statute, and the evil which it endeavored to remedy, may always be considered to ascertain its intent and interpret its acts.

U. S. *vs.* Ninety-nine Diamonds, 139 Fed., 961.

Whether a particular statute is mandatory or directory does not depend upon its etymology, but the intention of the legislature is to be ascertained from a consideration of the entire act, its nature, its object, and the consequences and the results from construing it one way or the other.

36 Cyc., 1159.

In the act of Congress of March 3, 1893 (27 Stat., 650), we find the word "authorized" is used in the same sense in which it is used in the act of May 11, 1912, and the word "authorized" is the only word in the statute which directs the Secretary of the Interior to carry out its objects and purposes, and the department has always construed such words to be mandatory.

Also the act of August 7, 1882 (22 Stat., 341), with reference to the word "authorize" reads as follows:

> "That with the consent of the Omaha Tribe of Indians expressed in open council, the Secretary of the Interior be, and he hereby is, AUTHORIZED to cause to be surveyed, if necessary, and sold all that part of their reservation in the State of Nebraska, lying west of the right-of-way, granted by said Indians to the Sioux City and Nebraska Railroad Co.," etc., etc.

It will be noted the wording of this act, with reference to the word "authorized," is almost identical with the wording

in the act of May 11, 1912. The word "authorized" as used in the act of 1882 is most certainly mandatory. It is not left to the discretion of the Secretary of the Interior whether he will put said [illegible] to operation or not. He is not at liberty to proceed any further under the treaty of March 6, 1865 (14 Stat., 467). All allotments thereafter must be made under the act of 1882. So, too, in act of May 11, 1912, it is mandatory and the Secretary of the Interior has no discretion in the matter, and it is mandatory upon him to do the thing designated in the act.

The word "authorized" has been used by Congress for many years in its acts relative to Indian affairs, and has always been used in the sense of being mandatory, and such usage has become a fixed term in Congressional history.

In the act of Congress relative to the Chippewa and Christian reservations (30 Stat., 92), Congress used the word "authorized" in the following language:

> "That the Secretary of the Interior be, and he is hereby, authorized to issue a patent in fee to the Moravian Church or its constitutional authorities, for certain lands described in said act, and that the residue of their lands shall be appraised by a commission consisting of said commissioner, the Indian agent, and a person to be selected by the Indians, and that said commission shall place a valuation for purposes hereinafter named upon all tracts of land now owned or held by inheritance, and make a separate report thereof."

In the act of Congress of April 1, 1880 (21 Stat., 701 Kappler, 28), being an act authorizing the Secretary of the Interior to deposit certain funds in the United States Treasury

in lieu of investment, Congress used the word "authorized" in the following language:

> "That the Secretary of the Interior be, and he is hereby, AUTHORIZED to deposit in the Treasury of the United States any and all sums now held by him, or which may hereafter be received by him as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds or other stocks and securities belonging to the Indian trust fund." * * *

Under the act of Congress (30 Stat., 93) the following language is used:

> "That the Secretary of the Interior be, and he is hereby, AUTHORIZED to pay over to the said Chippewa and Munsee or Christian Indians per capita the remainder of said funds of $42,560.36, trust funds now to their credit on the books of the Treasury Department, after deducting the expenses incurred in carrying out the provisions of this section."

Under the act of Congress (27 Stat., 633) the following language is used:

> "That the President of the United States is hereby AUTHORIZED immediately after the passage of this act to appoint a commission of three persons and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portion of allotted lands as are not required for homes for the Indian allottees." * * *

A number of other acts of Congress relative to Indian affairs might be cited, but the court will find upon investigation that Congress has used the word "AUTHORIZED" in a mandatory sense in nearly all of its acts with reference to Indian affairs, and whenever the word "AUTHORIZED" in these acts of Congress has been used in a permissive sense, some word or phrase is used in connection with the word "AUTHORIZED" to designate that it is not mandatory but permissive. We find this illustrated in section one of the act of Congress of February 28, 1891 (26 Stat., 794), which is as follows:

> "That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order, setting apart the same for their use, the President of the United States be, and he hereby is, *authorized, whenever in his opinion*, any reservation or any part thereof, of such Indians is advantageous for agricultural or grazing purposes to cause said reservation, or any part thereof, to be surveyed or resurveyed if necessary, and to allot every Indian located thereon one-eighth of a section of land."

Sections one and two of the act of Congress of October 9, 1888 (25 Stat., 611), is a good illustration of the way in which the word "authorized" is used in a mandatory and in a permissive sense by Congress.

Section one is mandatory and reads as follows:

> "That the Secretary of the Interior be, and he is hereby *authorized* to accept the surrender of and to cancel patents herein described and issued to the following named * * * Indians, * * * and

> to allot and patent to said Indians, under the act of February 8, 1887, such land as they would be thereby entitled to, had no previous patents to them severally been made."

Section two is permissive and reads as follows:

> "The Secretary of the Interior is hereby *authorized, in his discretion*, and whenever for good and sufficient reason he shall consider it for the best interest of the Indians, in making allotments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent."

We find from the foregoing that the word "authorized" in the various acts of Congress is used in a mandatory sense, and if any other or different meaning is intended the word is qualified in some manner to designate that it is not to be used in the mandatory sense.

To hold that the act of 1912 is not mandatory upon the Secretary of the Interior, and that he can continue to make allotments out of the tribal lands under the acts of 1882 and 1883 until such time as he may see fit to put the act of 1912 into operation, is to ignore the very object and purpose of said act, and it would give the Secretary of the Interior power completely to nullify the act of 1912, and it would place Congress and the Omaha Tribe of Indians in a position of doing a useless thing.

The Secretary of the Interior, by refusing to make these allotments asked for by complainants, recognizes the fact that he has no authority under the acts of 1882 and 1893 to make these allotments. The letter of C. F. Hauke, Second Assistant Commissioner, dated September 6, 1912, to John L. Webster, one of the attorneys for appellants, wherein he refused to grant these requests for allotments, cites the act of May 11, 1912, as one of the reasons for refusal (Evidence of William Rose King, Rec., 23).

Mr. Webster, when these cases were argued in the trial court, made the statement that the act of May 11, 1912, was permissive, and it was optional with the Secretary of the Interior when he would put said act into operation, and in order to get a direct expression from the Secretary of the Interior Oscar C. Anderson, attorney for the Omaha Tribe, wrote to the Commissioner of Indian Affairs a letter, of which the following is a copy:

Nov. 26, 1918.

Commissioner of Indian Affairs, Washington, D. C.

DEAR SIR:

When the Omaha tribal land case was tried in the U. S. District Court last spring, John L. Webster, who was the attorney for the claimants in said cases, argued to the judge of said court that inasmuch as the Secretary of the Interior had made no effort to carry out the provisions of the act of May 11, 1912 (37 Stat., 241), providing for the sale of the residue of the Omaha tribal lands, that he thereby considered that said act was not operative and that all the parties who had made applications for allotments prior to the time said act would be put into force that

said Indians would be entitled to said allotments. In answer to this argument I stated on behalf of the Omaha tribe that the reasons the Secretary of the Interior did not make provisions for carrying this act into effect, and the reason he had not done so up to this date, was on account of these cases being filed in the U. S. District Court at Omaha immediately after the passage of said act, and that the Secretary of the Interior did not wish to take any further steps under said act until these cases were finally disposed of and the rights of the party determined thereunder. If my position with reference to the Secretary of the Interior is correct, and this is the reason why he had not made any effort during these years since 1912 to put said act into operation, then I wish you would obtain from him a written statement setting forth his reason for not putting said act into effect so that we may be able to use the same with the U. S. Circuit Court of Appeals at St. Louis when these cases will be argued in said court.

The complainants in each one of said cases have appealed from the decision of the U. S. District Court to the Court of Appeals at St. Louis, and we will have to write our briefs some time during the month of December.

We would like to have the Secretary of the Interior either write a separate opinion or write an opinion which we can incorporate in our briefs, giving his reasons why he has not put into execution the aforesaid act of May 11, 1912.

Yours very respectfully,

O. C. ANDERSON.

In reply thereto he received a letter from S. G. Hopkins, Assistant Secretary, of which the following is a copy:

WASHINGTON, *Dec. 7, 1918.*

Mr. O. C. ANDERSON,
Attorney-at-Law, West Point, Nebraska.

SIR:

Your understanding, as set forth in the letter of November 26, 1918, to the Indian Office as to carrying out the provisions of the act of May 11, 1912 (37 Stat. L., 111)—an act to provide for the disposal of the unallotted land on the Omaha Indian reservation, in the State of Nebraska—is correct.

This is to say that until pending suits to enforce allotments on the reservation are finally disposed of and the tribal title is otherwise cleared, this Department will be unable to carry out the provisions of the act of 1912, *supra*.

There are pending at this time some seventy-five or one hundred allotment suits, involving possibly thirty-five hundred acres. The entire surplus lands of the reservation cover but approximately forty-five hundred acres.

Respectfully,

S. G. HOPKINS,
Assistant Secretary.

The general rule is:

"Wherever by the express language of any act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested and in respect to which they have a right to participate and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a part of

that body of public records of which the courts take judicial notice."

Such rules and regulations, duly prescribed, have the force of law.

1 Fed. Ann. (2d Ed.), sec. 11, p. 21
Caha *vs.* U. S., 152 U. S., 222.
Wilkins *vs.* U. S., 96 Fed., 841.

VIII.

THE ACT OF MAY 11, 1912, TOOK EFFECT UPON THE DAY OF ITS APPROVAL AND NEEDED NO PROMULGATION BY THE SECRETARY OF THE INTERIOR.

The rule is that a statute takes effect, if not otherwise provided, on the day of its approval, and needs no promulgation to give it effect.

1 Fed. Stat. Ann. (2d Ed.), Sec. 2, p. 10.
Mathews *vs.* Zane, 7 Wheat. (U. S.), 64.
Parkinson *vs.* State, 74 Amer. Dec., 522.

Counsel for appellants in their brief, on pages 34 and 35, argue that provisions of section 2 of said act are not mandatory because same could not be carried out or executed by the Secretary. These reservations are similar to reservations in many acts of Congress relative to Indian lands, and so far the Secretary of the Interior has experienced no great difficulty in executing same.

If Congress did not intend that the Secretary of the Interior should carry out these provisions, what was the object and purpose of Congress in directing him to do so? If Con-

gress intended to permit the Secretary of the Interior to continue making allotments under the acts of 1882 and 1893, what was the sense and purpose of Congress in directing him to do the things provided for in the act of 1912? As before stated, if the Secretary of the Interior is compelled to make allotments to plaintiffs in these various suits, it will completely nullify said act, as there will be no tribal lands left to sell, reserve, or convey by the Secretary of the Interior.

If Congress intended the Secretary of the Interior could still continue to make allotments out of these tribal lands after the passage of the act of 1912, it would have used suitable words to express that intention, and would have made proper provision in said act for said allotments.

When said act is construed according to its language, history, objects, and purposes, it will be seen that it is mandatory on the part of the Secretary of the Interior to carry out the provisions of said act, and that same took effect upon the day of its approval, and that the construction contended for by appellants would destroy and defeat the very object and purpose the Omaha Tribe of Indians and Congress had in passing said act.

IX.

THE UNITED STATES IS NOT ESTOPPED BY ITS CONDUCT FROM URGING THAT THE ACT OF MAY 11, 1912, OPERATED TO REPEAL THE ACTS OF 1882 AND 1893.

In this case a demurrer to the bill was sustained in the first instance by the district court. The plaintiff then ap-

pealed, and the court of appeals (see Chase *vs.* United States, 238 Fed., 887), reversed this ruling on the demurrer, basing its decision solely on the proposition that the act of 1893 did not repeal the act of 1882. No reference was made in the opinion to the act of May 11, 1912, or its effect. The case was remanded to the district court "with instructions to permit the defendant to answer if so advised." It is evident, therefore, that the only point of law established was that the act of 1893 did not repeal the act of 1882. The appellate court did not have the full case on the merits before it, and it could not foretell what shape the trial on the merits would take or what questions would then be presented on the second appeal. Except as to the one question of law decided, the case was remanded for trial on all other questions of law or fact that might be presented.

In the case of Mutual Life Insurance Company *vs.* Hill, 193 U. S., 551, it was decided:

> "A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

Justice Brewer, in delivering the opinion of the court, said:

> "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court

> that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided. An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings has been set aside, on amended pleadings a trial was had, quite a volume of testimony presented and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration."

In the case of Baleh *vs.* Haas, 73 Fed., 974, the court held:

> "On a second writ of error, an appellate court is bound by its prior decisions only upon points distinctly made and determined, and not upon points which might have been, but were not raised."

Judge Thayer, in delivering the opinion of the court, said:

> "As might be expected, we are naturally indisposed to hold a litigant bound by a supposed ruling on a point that was not raised in the former appeal, and was neither argued nor considered; and, in our judgment, the authorities, when rightly construed, do not require us to so hold, or to decide that the mere fact that the fellow-servant question might have been argued and decided on the first hearing, now estops the plaintiffs in error from raising that issue."

In the case of Thompson *vs.* Land Grant and Railway Company, 168 U. S., 451, cited by appellants, Justice Brewer said:

> "We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered and what has become settled for further disposition of the case."

In the case of Hastings *vs.* Foxworthy, 45 Neb., 676, the court held:

> "An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal; but, where the case was, on the first appeal, remanded generally for a new trial, and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal, and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

In Iowa Central Ry. Co. *vs.* Walker, 255 Fed., 648, the court said:

> "Only those issues of law which were before the appellate court, and by it determined, become the law of the case when, upon reversal, the cause is retried."

What is called the "law of the case" is only a rule of convenience, generally adhered to, of course, but not necessarily. The appellate court by such former decisions did not pre-

clude itself from doing justice between the parties, if it should be convinced that its former decision was erroneous.

Messinger *vs.* Anderson, 225 U. S., 436, 444.
Lewers & Cooke *vs.* Atcherly, 222 U. S., 285, 295.
Hertz *vs.* Woodman, 218 U. S., 205.

Appellants cite numerous cases relating to the question of estoppel, all to the point that a question once considered and determined becomes the law of the case. The citations are not in point and the argument thereon is not germane for the reason that the court did not have under consideration, on the former appeal, the question of whether the act of May 11, 1912, operated to repeal the acts of 1882 and 1893. The question was not called to the court's attention, was not before the court, and was not considered or decided by the court; hence the United States is not estopped by its conduct from urging that the act of 1912 repealed the act of 1882 and 1893.

Besides, to be available, estoppel must be pleaded. The question is not raised in the pleadings, was not raised at the trial in the District Court or on the former hearing in this court, hence cannot be available now.

It is the general rule that where an estoppel is relied upon it must be specially pleaded.

Jones *vs.* Peebles, 30 So., 564.
Thomas *vs.* Blair, 196 U. S., 637.
Ranson *vs.* Stanberry, 22 Ia., 334.
McQueen *vs.* Bank of Edgmont, 107 N. W., 493.

An estoppel must be pleaded in the reply to be available in avoidance of a defense.

Jasper Co. Elect. Ry. Co. *vs.* Curtis, 154 Mo., 10.
McClanahan *vs.* Payne, 86 Mo. App., 284.
Carnahan *vs.* Brewster, 96 N. W., 590.

While the doctrine may in some cases be applied against the Government it is never applied to divest existing rights of individuals without their consent.

In United States *ex.* Lachapelle, 81 Fed., 152, the court said:

> "Although the doctrine of estoppel may be applied in some cases against the Government, it cannot be applied to give one private individual an advantage over another, or to divest existing rights of individuals without their consent."

This court, in cases affecting the rights of the Government and its Indian wards, takes judicial notice of all laws of the United States and regulations made thereunder, whether pleaded or not pleaded.

In re Dunn, 212 U. S., 374.

Missouri, K. & T. R. Co. *ex.* Wulf, 226 U. S., 570.

Conclusion.

Under the act of Congress of August 7, 1882 (22 Stat., 341), the only title the Omaha Tribe of Indians had in and to the unallotted tribal lands, was only that of possession or occupancy, and Congress had full power and authority to pass the act of March 3, 1893 (27 Stat., 630), and May 11, 1912 (37 Stat., 111).

The only rights, if any, the appellants had in and to these tribal lands was a floating or inchoate right and would not attach to any particular tract of land until such tract of land has been definitely located, selected, and set apart to the allottee.

That none of the suits of appellants were instituted until after the approval of the act of May 11, 1912 (37 Stat., 111).

The act of March 3, 1893, repealed section 8 of the act of August 7, 1882, because it deals with the entire subject-matter of said section 8, and the United States and the Indians placed this interpretation upon said act.

The act of May 11, 1912, repealed all parts of the acts of Congress of August 7, 1882, and March 3, 1893, so far as said acts relate to the allotment of the unallotted lands of the Omaha Tribe of Indians, and said act provides a comprehensive plan to dispose of all of the unallotted lands of the Omaha Tribe of Indians.

The act of May 11, 1912, is mandatory and peremptory upon the Secretary of the Interior to carry out the provisions of the act.

Said Act took effect on May 11, 1912, the date of its approval and needed no promulgation to give it operation.

The United States is not estopped by its conduct from urging that the act of May 11, 1912, operated the repeal of the aforesaid acts of Congress of 1882 and 1893 so far as they related to the disposition of the unallotted lands of the Omaha Tribe of Indians.

This court takes judicial notice of all laws of the United States without pleading.

Respectfully submitted,

OSCAR C. ANDERSON,
Solicitor for the Omaha Tribe of Indians.

CHARLES J. KAPPLER,
Of Counsel.